SUPREME COURT, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1968.

No. 579

CLAY L. SHAW,

Plaintiff,

versus

JIM GARRISON individually, and as District Attorney for the Parish of Orleans, State of Louisiana, and JAMES L. ALCOCK individually, and as Executive Assistant District Attorney for the Parish of Orleans, State of Louisiana, and CHARLES R. WARD individually, and as an Assistant District Attorney for the Parish of Orleans, State of Louisiana,

Defendants.

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

JURISDICTIONAL STATEMENT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968.

No. .....

CLAY L. SHAW,

Plaintiff,

versus

JIM GARRISON individually, and as District Attorney for the Parish of Orleans, State of Louisiana, and JAMES L. ALCOCK individually, and as Executive Assistant District Attorney for the Parish of Orleans, State of Louisiana, and CHARLES R. WARD individually, and as an Assistant District Attorney for the Parish of Orleans, State of Louisiana,

Defendants.

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the United States District Court for the Eastern District of Louisiana, entered on July 23, 1968, denying him an injunction prohibiting prosecution of an indictment

charging him with having conspired to assassinate John F. Kennedy, late President of the United States, and other relief. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

I. THE OPINIONS BELOW.

The temporary restraining order and the reasons therefor issued by Judge Frederick J. R. Heebe on May 28, 1968, at 2:10 o'clock p.m., are annexed hereto as Appendix A.

The per curiam opinion of the three-judge Federal District Court for the Eastern District of Louisiana rendered July 23, 1968, is attached hereto as Appendix B. As of this date, Judge Heebe has not rendered a concurring opinion.

II. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

A. This is an appeal from the opinion of the three-judge Federal District Court rendered on July 23, 1968, dismissing plaintiff's suit.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 United States Code, Sections 1253 and 2101.

The appellant instituted a plenary federal action on May 27, 1968, pursuant to Title 28 Section 1343(3),

28 USC, Sections 2281, 2283, 2284, 42 USC, Sections 1983 and 1985, and 28 USC, Section 2201, for an injunction prohibiting Jim Garrison, District Attorney for the Parish of Orleans, State of Louisiana, and his assistants from further prosecution of the matter entitled "State of Louisiana vs. Clay L. Shaw", No. 198-059 of the Docket of the Criminal District Court for the Parish of Orleans, State of Louisiana, resulting from an indictment handed down by the Grand Jury for the Parish of Orleans, State of Louisiana, at the instigation of the Defendant Garrison, charging plaintiff with having willfully and unlawfully conspired with David W. Ferrie, Lee Harvey Oswald and others, to murder John F. Kennedy.

Plaintiff also asks that there be further judgment adjudging and decreeing that the Report of the Warren Commission to the President of the United States, pursuant to Executive Order No. 11130, is valid, accurate and correct, binding and controlling upon all courts of the United States, and in particular but not exclusive of Section "C" of the Criminal District Court for the Parish of Orleans, State of Louisiana, and admissible in evidence in the case of "State of Louisiana vs. Clay L. Shaw", No. 198-059 of the Docket of said Court; and for further judgment decreeing Articles 402, 403, 409, 433, 434, 484, 485, 627 and 912, of the Louisiana Code of Criminal Procedure, LRS 14:26, and Article 7, Section 41, of the Louisiana Constitution of 1921, to be illegal, null and void, and unconstitutional in violation of the provisions of the First, Fourth, Fifth, Sixth and

Fourteenth Amendments to the Constitution of the United States; and further judgment quashing and setting aside the indictment returned against Clay L. Shaw by the Grand Jury for the Parish of Orleans, State of Louisiana, on the 22nd day of March, 1967, or alternatively, pursuant to and to preserve plaintiff's rights, privileges, civil rights and constitutional rights under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, for judgment of permanent mandatory injunction, compelling and requiring defendants to furnish plaintiff, prior to trial, certain particulars of the crime allegedly committed by him, so as to enable him to properly prepare his defense.

On May 28, 1968, at 2:10 o'clock p.m., Judge Heebe of Section "B" of the United States District Court for the Eastern District of Louisiana, issued a temporary restraining order, pursuant to 28 USC 2284 (3) enjoining and restraining the defendants, and each of them, from taking any further action in the prosecution of the case entitled "State of Louisiana vs. Clay L. Shaw", No. 198-059 of the Docket of the Criminal District Court for the Parish of Orleans, State of Louisiana, pending the further orders of said Court.

On June 13, 1968, plaintiff filed an amended complaint in which it is alleged that Article 782 of the Louisiana Code of Criminal Procedure is null and void and of no effect and that it is repugnant to and violative of the Sixth and Fourteenth Amendments to

the Constitution of the United States; in this amended complaint, plaintiff further asserted that his First Amendment rights and those of others which are basic to his freedom are imperiled by calculated, deliberate state assault, and a successful defense of the state's criminal prosecution would not assure adequate vindication of those First Amendment rights.

Simultaneously with the filing of the amended complaint, plaintiff filed: (a) Motion to join the Attorney General of the United States as a defendant; (b) Motion to compel oral examination of certain of the defendants and their assistants.

The defendants filed a motion to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted, as well as a motion to drop the defendants Alcock and Ward as defendants. No responsive pleadings were filed by the defendants to either the original complaint or the amended complaint.

All motions filed by the plaintiff, as well as those filed by the defendants, were fixed for oral argument and heard by the Court on Monday, June 17, 1968, at 10:00 o'clock a.m. No oral evidence was allowed to be adduced. Briefs were filed by both plaintiff and the defendants.

The United States Attorney for the Eastern District of Louisiana, in response to plaintiff's motion to

join the Attorney General of the United States as a defendant, suggested to the Court: (a) The court lacks jurisdiction over the person of the Attorney General and the venue is improper; (b) The court lacks jurisdiction to control by mandamus, the discretion of the Attorney General, and the attempt to join the Attorney General as a party defendant in this action is in reality an attempt to maintain an unconsented suit against the United States; (c) The plaintiff has failed to allege or demonstrate a justiciable case or controversy insofar as the Attorney General is concerned.

On July 23, 1968, the District Court entered an opinion and judgment dismissing plaintiff's suit. The motion to dismiss filed by the defendants was considered as a motion for a summary judgment, and granted. (Appendix A.)

The judgment of the District Court was unanimous. It was stated that District Judge Heebe concurs and will hand down a concurring opinion. As of this date, no such opinion has been rendered.

The judgment sought to be reviewed is the judgment entered by the three-judge Federal District Court on July 23, 1968.

A notice of appeal to this Court was duly filed with the Clerk of the United States District Court for the Eastern District of Louisiana on August 1, 1968.

On August 1, 1968, plaintiff filed a motion for an injunction prohibiting and restraining the defendants from the further prosecution of the state court criminal proceedings, pending the hearing and determination of plaintiff's appeal to this Court. Defendants answered this motion and opposed same, denying that plaintiff was entitled to an injunction pending appeal.

On August 13, 1968, the three-judge District Court entered an order that "until such time as the plaintiff's appeal has been disposed of by the United States Supreme Court that the defendants be and they are hereby restrained and enjoined from further prosecution of the case entitled State of Louisiana vs. Clay L. Shaw, No. 198-059 of the Docket of the Criminal District Court for the Parish of Orleans, State of Louisiana." The order was signed by all three members of the Court. Copy of the order and reasons therefor is attached hereto as Appendix C.

III. CASES SUSTAINING THE JURISDICTION OF THE COURT.

Dombrowski vs. Pfister, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965); *Cameron vs. Johnson,* 88 S. Ct. 1335 (1968); *Zwickler vs. Coota,* 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967); *Duncan vs. Louisiana,* 88 S. Ct. 1444 (1968); *Bloom vs. Illinois,* 88 S. Ct. 1447 (1968); *Maxwell vs. Dow,* 176 U.S. 581, 20 S. Ct. 448 (1900); *Andres vs. U. S.,* 333 U.S. 740, 68 S. Ct. 880.

IV. THE LOUISIANA STATUTES INVOLVED IN THIS CASE.

The validity of the Louisiana Conspiracy Statute LRS 14:26, is here involved:

> "Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime: provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination.
>
> "Where the intended basic crime has been consummated the conspirators may be tried for either the conspiracy or the completed offense, and a conviction for one shall not bar a prosecution for the other.
>
> "Whoever is a party to a criminal

The following articles of the Louisiana Code of Criminal Procedure:

"Art. 402. Service of Women as Jurors.

"A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service."

"Art. 403. Exemption from Jury Service.

"The following persons are exempt from jury service, but the exemption is personal to them and is not a ground for challenge:

"(1) The governor, lieutenant governor, state comptroller, state treasurer, secretary of state, superintendent of public education, their clerks and employees, the members, officers and clerks of the legislature, and the judges and active officers of the several courts of this state;

"(2) Any other public official, if jury service would seriously interfere with the performance of his official duties;

"(3) Attorneys-at-law, peace officers, ministers of the gospel, physicians and dentists actively engaged in the practice of their professions, school teachers, school bus drivers, pharmacists, members of paid fire departments, chiefs and their first assistants of bona fide vol-

unteer fire departments, and persons who are required to travel regularly and routinely in the course and scope of their employment;

"(4) Persons who because of age, sickness, or other physical infirmity would suffer serious detriment if required to serve as a juror; and

"(5) Persons who have served as grand or petit jurors in criminal cases or as trial jurors in civil cases during a period of twelve months immediately preceding their selection for jury service."

"Art. 409. Selection of General Venire in Orleans Parish.

"In the Parish of Orleans, the jury commission shall select impartially at least seven hundred fifty persons having the qualifications to serve as jurors, who shall constitute the general venire.

"A list of the persons so selected shall be prepared and certified by the commission as the general venire list and shall be kept as part of the records of the commission.

"The name and address of each person on the list shall be written on a separate slip of paper which shall be placed in a box labeled 'General Venire Box.'"

"No drawing shall be made from a general venire containing fewer than seven hundred fifty names, except when the Court orders the drawing of tales jurors.

"After the jury commission has selected the general venire, it shall lock and seal the general venire box and deliver it to the secretary of the commission, as the custodian thereof."

"Art. 433. Persons Present During Grand Jury Sessions.

"A. Only the following persons may be present at the sessions of the grand jury:

(1) The district attorney and assistant district attorneys, or any one or more of them;

(2) The witness under examination;

(3) A person sworn to record the proceedings of, and the testimony given before, the grand jury; and

(4) An interpreter sworn to translate the testimony of a witness who is unable to speak the English language.

"B. No person, other than a grand juror, shall be present while the grand jury is deliberating and voting.

"C. A person who is intentionally present at a meeting of the grand jury, except as authorized by Paragraph A of this article, shall be in constructive contempt of court."

"Art. 434. Secrecy of Grand Jury Meetings.

"Members of the grand jury, all other persons present at a grand jury meeting, and all persons having confidential access to information concerning grand jury proceedings, shall keep secret the testimony of witnesses and all other matters occurring at, or directly connected with, a meeting of the grand jury. However, after the indictment, such persons may reveal statutory irregularities in grand jury proceedings to defense counsel, the district attorney, or the court, and may testify concerning them. Such persons may disclose testimony given before the grand jury, at any time when permitted by the court, to show that a witness committed perjury in his testimony before the grand jury. A witness may discuss his testimony given before the grand jury with counsel for a person under investigation or indicted, with the district attorney, or with the court.

"Any person who violates the provisions of this article shall be in constructive contempt of court."

"Art. 484. Bill of Particulars.

"A motion for a bill of particulars may be filed of right before trial or within ten days af-

ter arraignment, whichever is earlier. After expiration of the ten-day period the court may permit the filing of such a motion until the commencement of trial. When a motion is filed, or on its own motion, the court may require the district attorney to furnish a bill of particulars setting up more specifically the nature and cause of the charge against the defendant.

"Supplemental bills of particulars or a new bill may be ordered by the court at any time before the trial begins.

"When a bill of particulars is furnished, it shall be filed of record and a copy of the bill given to the defendant."

"Art. 485. Effect of Inconsistent or Limiting Allegations of Bill of Particulars.

"If it appears from the bill of particulars furnished under Article 484, together with any particulars appearing in the indictment, that the offense charged in the indictment was not committed, or that the defendant did not commit it, or that there is a ground for quashing the indictment, the court may on its own motion, and on motion of the defendant shall, order that the indictment be quashed unless the defect is cured. The defect will be cured if the district attorney furnishes, within a period fixed by the court and not to exceed three days from the order, another bill of particulars which either by itself or to-

gether with any particulars appearing in the indictment so states the particulars as to make it appear that the offense charged was committed by the defendant, or that there is no ground for quashing the indictment, as the case may be."

"Art. 627. Appeals.

"If a change of venue is granted to the defendant over the objection of the state, or if the court denies an application by the state for a change of venue, the state shall have the right to appeal from the ruling, within the legal delays for making a motion for an appeal, before a trial on the merits. Prior to sentence the defendant may not appeal from a ruling changing or refusing to change the venue."

"Art. 912. Judgments or Rulings Appealable.

"A. Only a final judgment or ruling is appealable.

"B. The state cannot appeal from a verdict of acquittal. Adverse judgments or rulings from which the state may appeal include, but are not limited to, judgments or rulings on:

(1) A motion to quash an indictment or any count thereof;

(2) A plea of time limitation;

(3) A plea of double jeopardy;

(4) A motion in arrest of judgment;

(5) A motion to change the venue;

(6) A motion to recuse; and

(7) An order in an extradition proceeding.

"C. The judgments or rulings from which the defendant may appeal include, but are not limited to:

(1) A judgment which imposes sentence;

(2) A ruling upon a motion by the state declaring the present insanity of the defendant; and

(3) A ruling ordering the defendant to be extradited."

The Article and Section of the Louisiana Constitution of 1921 here involved is:

Article VII, Section 41.

"§ 41. Selection of jurors; women jurors; trial by judge; trial by jury.

"Section 41. The legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District

Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

V. THE FEDERAL STATUTES INVOLVED IN THIS CASE.

1. *USC Title 28, Paragraph 2283.*

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment. June 25, 1948, c. 646, 62 Stat. 968."

2. *USC Title 42, Paragraph 1983.*

"Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. § 1979."

VI. QUESTIONS PRESENTED BY THE APPEAL.

1. Whether 42 .USC, Section 1983, constitutes an express exception to the anti-injunction bar of 28 USC, Section 2283.

2. Whether, in light of the criteria set forth in *Dombrowski vs. Pfister, supra,* the abuse and misuse of prosecutorial powers through and by a concerted pattern of persecution of plaintiff and the willful and wholesale disregard of his federally-guaranteed constitutional rights warrants federal injunctive relief.

3. Whether the chilling-effect exception established by this Court, in its decision in *Dombrowski vs. Pfister, supra,* should be limited to those circumstances which show a violation of First Amendment rights only.

4. Whether *Dombrowski's* remedy is justified and applicable under circumstances showing that federal rights other than First Amendment rights are being violated by a calculated, deliberate state assault, resulting in irreparable injury, clear and imminent,

which cannot be safeguarded and protected within the context of the state criminal proceedings.

5. Whether federal injunctive relief is warranted under circumstances where public officials are conducting a reign of terror by the misuse and abuse of the public offices which they hold by conducting an illegal, unwarranted, fraudulent and useless probe of the assassination of the late John F. Kennedy.

6. Whether in light of the criteria set forth in *Dombrowski vs. Pfister, supra,* abuse and misuse of prosecutorial power and the conduct of an illegal, useless and fraudulent probe of the assassination of John F. Kennedy, resulting in the bad faith prosecution of plaintiff, for the sole purpose of obtaining a judicial forum for defendants' attacks on the Warren Report, warrants federal injunctive relief.

7. Whether in light of the criteria set forth in *Duncan vs. Louisiana, supra, Bloom vs. Illinois, supra,* and *Maxwell vs. Dow, supra,* Article 782 of the Louisiana Code of Criminal Procedure to the effect that the jury before whom plaintiff's case is to be tried must be composed of twelve jurors, only nine of whom must concur to render a verdict, is unconstitutional as a denial of due process of law, as guaranteed by the Sixth and Fourteenth Amendments.

8. Whether or not circumstances which show serious bad-faith prosecution on the part of public prosecutors, resulting in the persecution and the deliber-

ate, concerted and repeated violation of plaintiff's federally-guaranteed constitutional rights, constitute such exceptional and unusual circumstances as to warrant federal injunctive relief.

9. Whether or not this Court should order the Attorney General of the United States to defend the validity of the Warren Report to the President of the United States, pursuant to Executive Order No. 11130, against the intemperate and vitriolic attacks made upon it, the President of these United States, the Chief Justice of the Supreme Court of the United States, and other high-ranking public officials by a public prosecutor acting in bad faith for no useful, valid, or legal purpose.

10. Whether or not the validity of the Warren Report is of such tremendous public importance as to warrant the issuance by this Court of an order directing the Attorney General of the United States to become a party to a case wherein the integrity of the United States, as well as the President thereof, and the distinguished members of the Warren Commission, is being attacked and impugned by a public prosecutor acting in bad faith.

11. The validity as well as the judicial effect to be given by the courts of the land to the Report of the Warren Commission to the President of the United States, pursuant to Executive Order No. 11130.

12. The constitutionality of the Louisiana Conspiracy Statute LRS 14.26.

13. The constitutionality of Articles 627 and 912 of the Louisiana Code of Criminal Procedure which grant to the state and denies to the accused, a right of appeal from a judgment of the trial court on a motion for a change of venue.

14. The constitutionality of Articles 433 and 434 of the Louisiana Code of Criminal Procedure which prohibit a person subpoenaed to appear before the grand jury, the right to have counsel present during his appearance.

15. The constitutionality of Articles 484 and 485 of the Louisiana Code of Criminal Procedure with respect to the particulars of the crime which must be furnished by the state to the accused.

16. The constitutionality of Articles 402 and 403 of the Louisiana Code of Criminal Procedure and Article VII, Section 41, of the Louisiana Constitution of 1921, exempting women from jury service and permitting their selection as jurors only if they have previously filed a written declaration of their desire to be subject to jury service.

17. The constitutionality of Article 409 of the Louisiana Code of Criminal Procedure providing for the selection of the general venire for the Parish of Orleans.

VII. THE QUESTIONS PRESENTED ARE SERIOUS AND SUBSTANTIAL.

The issues involved in this appeal are serious and substantial questions which are of importance, not only to the appellant but to all citizens of the United States and the world at large. This case arises out of a probe of the assassination of John F. Kennedy, late President of the United States, which is being conducted by Jim Garrison, District Attorney for the Parish of Orleans, State of Louisiana.

During the course of the investigation being conducted by this public prosecutor, he has attacked and impugned the integrity of the Chief Executive Officer of this country, Lyndon B. Johnson, the President of the United States, the Chief Justice of this Court, and all members of the Warren Commission, the Attorney General of the United States, and countless other high-ranking government officials and agencies. Garrison's attacks upon the President of the United States have gone so far as to imply that he was a part of, and a co-conspirator, in a conspiracy which resulted in the assassination of the late John F. Kennedy.

While it is true that there are many critics of the Warren Report, none of them have been as vitriolic in their denunciation of the Report and all persons responsible for its confection, and none of them have been as irresponsible, imprudent and careless of the constitutional rights of the citizens of this country as

has been the defendant Garrison; nor has any critic of the Warren Report received the attention and the publicity which have surrounded his probe since knowledge of its existence became public in February of 1967. The fact of Garrison's Kennedy assassination probe and his arrest of the plaintiff has received in-depth, front-page coverage by all news media, not only in this country but throughout the world. The validity of the Warren Report is at stake in this case. The validity of the Warren Report is one of the very substantial and very serious questions which is presented by this appeal. This case is of tremendous public importance and its outcome is being watched and awaited throughout the country and the world at large.

The question of whether 42 USC 1983 is an express exception to the injunctive bar of 28 USC 2283 is a substantial question, as has been recognized by this Court in previous decisions. This very serious and very substantial question, which is yet to be answered by this Court, is again presented to it for adjudication.

This Court, in its decision in *Dombrowski vs. Pfister* created what is now known as "the chilling effect exception" to the general prohibition against Federal injunctions of state court proceedings. The proper application and the meaning of the relief provided for by this Court in *Dombrowski* is a further serious and substantial question which is again presented to the Court for adjudication by virtue of this

appeal. Is the protection afforded by the cause of action provided for in *Dombrowski* to be limited to the protection of First Amendment rights, or did the Court intend the remedy to be available for the protection of all federally-guaranteed constitutional rights. Are the rights guaranteed to the citizens by virtue of the First Amendment more important, more precious, more valuable, so as to be entitled to more and greater protection than those provided for by other amendments to the Constitution. Related to this problem is the serious question of whether or not irreparable injury, as delineated and defined by this Court in *Dombrowski*, is to be confined and limited to the facts and circumstances of that case.

The meaning of due process of law, as provided for the citizens by the Fourteenth Amendment to the Constitution, is again presented to this Court, as it has been on many occasions in the past, for definition and determination of its meaning. This appeal presents the serious and substantial question of whether or not the plaintiff was entitled to an evidentiary hearing in the lower court under the facts and circumstances presented by the pleadings and exhibits filed on his behalf, rather than a summary dismissal of his suit without a hearing. This Court has, on many occasions in the past recognized that the guarantee of due process of law provided for by the Fourteenth Amendment is a most serious question.

There are other serious and substantial questions and issues presented by this appeal, such as the need for determination of what constitutes such exceptional circumstances as will warrant federal injunctive relief against state court criminal proceedings instituted by a public prosecutor acting in bad faith without hope of obtaining a valid conviction.

Also at issue are various provisions of the Louisiana Code of Criminal Procedure, the Louisiana Conspiracy Statute, and a Section of the Louisiana Constitution, the validity of which are attacked as being unconstitutional on various grounds. Of foremost importance is the constitutionality of Article 782 which provides that persons charged with a violation of the Conspiracy Statute are to be tried by a jury of twelve, only nine of whom must concur to reach a verdict.

The decision of the District Court by which it dismissed plaintiff's suit without granting him an evidentiary hearing is in direct conflict with many of the prior decisions of this Court. The District Court abused its discretion and acted contrary to law when it failed to grant plaintiff the relief sought by him for the protection of his federally-guaranteed constitutional rights. The lower court abused its discretion to such an extent that it even refused to allow plaintiff an opportunity to be heard through the production of evidence which would have unquestionably established the fraud being perpetrated by Garrison upon the public, as a direct result of which plaintiff's rights

have been trampled on and virtually destroyed. This appeal does present very serious and very substantial questions for adjudication by this Court.

VIII. THE PLEADINGS IN THE LOWER COURT.

The plaintiff CLAY L. SHAW has been indicted by the Grand Jury for the Parish of Orleans, State of Louisiana, and charged with having willfully and unlawfully conspired with David W. Ferrie, Lee Harvey Oswald, and others, to murder John F. Kennedy. Trial of the case on its merits has not commenced.

On May 27, 1968, plaintiff filed a complaint in the United States District Court for the Eastern District of Louisiana, alleging that his civil and constitutional rights, and in particular his First Amendment rights to freedom of expression, freedom of movement, and others, had been violated and trampled on to such an extent that they have been obliterated. It is alleged that the conduct of the defendants constitutes such an abuse of the prosecutorial functions of the public offices held by the defendants, and the extraordinary circumstances related in said complaint are such as to justify the exercise by this Court of its equity powers to grant plaintiff the relief sought. That the defendants' actions have had such a chilling effect on his freedom of expression and his freedom of movement as to constitute "the irreparable injury, clear and imminent, which warrants the exercise by the Federal Court of its equity powers to grant plaintiff the relief sought."

Plaintiff attacked the constitutionality of various Articles of the Code of Criminal Procedure and the Conspiracy Statute of the State of Louisiana as being overly broad, sweeping regulations of his constitutionally-guaranteed rights of freedom of expression and freedom of movement, and as such, null and void on their face. It is further alleged that plaintiff was arrested not with any expectation of securing a valid conviction, but rather as a part of a plan to employ arrests, seizures and threats of prosecution, under color of the statutes, to harass and discourage him and others from asserting their constitutional rights.

Plaintiff asked that a three-judge court be organized, pursuant to 28 USC, Sections 2281, 2283 and 2284, and that in due course there be judgment permanently enjoining and restraining the defendants, and each of them and their respective assistants, attorneys and associates, from further prosecution of the matter entitled "State of Louisiana vs. Clay L. Shaw"; that there be further judgment decreeing the Report of the Warren Commission to the President of the United States, pursuant to Executive Order No. 11130, to be valid, accurate and correct, binding and controlling upon all courts, and in particular, Section C of the Criminal District Court for the Parish of Orleans, and admissible in evidence in the case of "State of Louisiana vs. Clay L. Shaw"; that there be judgment decreeing Articles 402, 403, 409, 433, 434, 484, 485, 627 and 912, of the Louisiana Code of Criminal Procedure, LRS 14:26

and Article VII, Section 41, of the Louisiana Constitution of 1921, to be illegal, null and void, and unconstitutional, in violation of the provisions of the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States; and further judgment quashing and setting aside the indictment returned against the plaintiff by the Grand Jury for the Parish of Orleans on March 22, 1967; in the alternative and in order to preserve plaintiff's rights, privileges, civil rights and constitutional rights, under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America, for judgment of permanent, mandatory injunction compelling and requiring the defendants, and each of them, to furnish plaintiff with various information and particulars as to the fact of the crime allegedly committed by him, as well as other documents, statements and information necessary and required by him in order to enable him to properly prepare and defend the charges against him.

On May 28, 1968, Judge Frederick J. R. Heebe of Section B of the United States District Court, pursuant to the Provisions of 28 USC, Section 2284 (3), issued a temporary restraining order to the effect that the defendants, and each of them, and their respective assistants, associates, attorneys, employees, agents, officers and assigns are hereby "enjoined and restrained from taking any further action in the prosecution of the case entitled 'State of Louisiana vs. Clay L. Shaw,' No. 198-059 of the Docket

of the Criminal District Court for the Parish of Orleans, State of Louisiana, pending the further orders of this Court." Judge Heebe handed down written reasons for the issuance of said temporary restraining order.

On May 28, 1968, the Honorable John R. Brown, Chief Judge of the Fifth Circuit Court of Appeals, issued an order in which he designated the Honorable Frederick J. R. Heebe, the Honorable James A. Comiskey of the Eastern District of Louisiana, and the Honorable Robert A. Ainsworth, Circuit Judge of the Fifth Circuit Court of Appeals, to constitute the Court requested by plaintiff, as aforesaid.

On June 3, 1968, plaintiff moved the Court, pursuant to Rule 26A of the Federal Rules of Civil Procedure, for an order granting him leave to serve notice of the taking of depositions of certain individuals, i.e., Messrs. Andrew J. Sciambra, James L. Alcock, Lynn Loisel, Louis Ivon, Noel Rada, Dr. Esmond Fatter, and Mrs. Sandra Moffet McMaines. Notices to take depositions upon oral examination were issued to Louis Ivon, Lynn Loisel, Andrew J. Sciambra and James L. Alcock. These individuals were deposed on June 5 and June 6, 1968, and transcripts of said depositions are attached to a Motion to Compel Oral Examination and for Expenses, filed on behalf of the plaintiff on June 10, 1968.

On June 13, 1968, plaintiff filed an amended complaint setting forth in a detailed manner numerous

violations of his civil and constitutional rights as guaranteed to him by the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as occasioned and as caused by the extraordinary circumstances surrounding the events which had transpired as a result of the abuse and misuse by the defendants of the prosecutorial powers visted in them by virtue of the public offices which they hold.

On June 13, 1968, plaintiff filed with the Court a motion to join the Attorney General of the United States as a defendant in these proceedings by virtue of the tremendous public importance, not only to plaintiff but to all citizens of the United States, of the issues raised in these proceedings and asserted that the Attorney General of the United States should be made a party to these proceedings so as to protect the interests of the United States and all of its citizens, and in particular, for the purpose of protecting the integrity of the United States, the members of the Warren Commission and others.

On June 13, 1968, defendants filed an answer to plaintiff's motion to compel oral examination and for expenses; a motion to drop Defendants Charles R. Ward and James L. Alcock as party defendants; and a motion to dismiss plaintiff's complaint because the complaint failed to state a claim upon which relief can be granted.

On June 10, 1968, Judge Heebe called a pre-trial conference of all counsel for plaintiff and defendants for June 13, 1968. Included in that order was a mandate to the effect that counsel for plaintiff and defendants shall file with the clerk of court any and all motions pursuant to this matter by Thursday morning, June 13, 1968, prior to said pre-trial conference. Said pre-trial conference was held as scheduled, at which time the court set a hearing on all motions for Monday, June 17, 1968. All motions were argued before the court, as scheduled, on June 17, 1968.

No evidentiary hearing was had, the case being heard and decided on the pleadings and the exhibits attached thereto. No affidavits were filed in support of defendants' motion to dismiss, which was treated by the court as a motion for a summary judgment.

On July 23, 1968, the three-judge court rendered judgment dismissing plaintiff's complaint. Notice of appeal was filed on August 1, 1968, together with a motion for an injunction, pending the hearing and determination of plaintiff's appeal to this Court. On August 13, 1968, this injunction was granted.

IX. STATEMENT OF THE FACTS.

The plaintiff, CLAY L. SHAW, asserts that he was arrested without cause on March 1, 1967, at the instance of the Defendant Garrison, and booked with participating in a conspiracy to murder John F.

Kennedy. That his arrest, as well as his subsequent indictment, and all of the events which have transpired since the date of his arrest, were occasioned and caused by the Defendant Garrison, solely and only for the purpose of securing a judicial forum for his attacks on the Warren Report with respect to the assassination of the late President John F. Kennedy. That he was arrested and subsequently indicted at the instance of the Defendant Garrison, solely and only because of the fact that he needed a vehicle to the judicial forum which he sought for his attacks upon the Warren Report, as a result of which he, the plaintiff, has been used as a pawn and a patsy, and is in fact a pawn and a patsy in the hands of the Defendant Garrison and is being used by him, solely and only for the aforesaid purposes.

Plaintiff asserts that he requires a sanctuary in this Court to grant him relief from the irreparable harm, clear and imminent, which he has suffered at the hands of the defendants since March 1, 1967, as a result of the most extraordinary facts and circumstances which have occurred since that date and which are set forth in detail in the complaint and the amendment thereto. That unless the relief sought is granted, plaintiff will continue to suffer irreparable harm, clear and imminent, and can obtain no relief from any source other than this Court, the prime guardian of the civil and constitutional rights of all citizens of the United States of America. That his constitutional rights, and in particular, the

rights of freedom of expression and freedom of movement, as guaranteed to him by the First Amendment to the Constitution of the United States, have been violated as a result of the abuse and misuse of the prosecutorial powers vested in the defendants by virtue of the public offices which they hold.

In the early part of February 1967, it was disclosed in the public press that Jim Garrison, District Attorney for the Parish of Orleans, State of Louisiana, was conducting his own personal probe of the facts and circumstances surrounding the assassination of John F. Kennedy, late President of the United States. Garrison would neither confirm nor deny the story. On February 19, 1967, Garrison told newsmen, "Arrests will be made, charges will be filed, and convictions will be obtained." According to him, arrests would have been made immediately, but because of the unwanted publicity, they would now have to be deferred for months. He further stated that he would seek private financing in order not to have to conduct the inquiry in a "fish bowl". Two political allies, Willard Robertson and Joseph Rault, Jr., at the behest of Garrison, organized fifty New Orleans businessmen into a group that called itself "Truth or Consequences". Its function was to supply Garrison with financial and moral support.

On February 19, 1967, David Ferrie, a defrocked airline pilot, sometime private investigator, psychologist, minister, etc., told newsmen that Garrison had him pegged as a get-away pilot in the as-

sassination and confirmed that he had been questioned as to his whereabouts in November of 1963.

On February 20, 1967, Garrison charged the Warren Commission Report was both "unsuccessful and incomplete."

On February 22, 1967, David W. Ferrie was found dead in his apartment and, in due course, his death was ruled by the local coroner as having resulted from natural causes and not suicide, as is claimed by Garrison.

On February 23, 1967, George Lardner, writing in the Washington Post, said that Ferrie had told him shortly before his death that he did not know Lee Harvey Oswald.

On February 24, 1967, Garrison publicly stated that he had solved the assassination "months ago" and would arrest all individuals involved.

On February 24, 1967, Garrison told newsmen he would not turn over his information to the Federal Government. He accused Washington of "withholding material which should have been turned over to law enforcement agencies with the proper legal jurisdiction." The following day, he said, "The Warren Commission was wrong." and he had "no reason to believe at this time Lee Harvey Oswald killed anybody in Dallas. . . ."

On February 27, 1967, Perry Raymond Russo, a Baton Rouge insurance salesman said, in a television interview, that he saw a man named Clem Bertrand plot with Ferrie and Oswald at a party at Ferrie's apartment in 1963.

On March 1, 1967, without any cause therefor, Garrison caused Clay L. Shaw, the plaintiff herein, to be arrested and charged under the alias "Clay Bertrand" with "participating in a conspiracy to murder John F. Kennedy." In due course, plaintiff was released on bond set at $10,000, and is at present free on said bond. Plaintiff entered a plea of "Not Guilty" to the charges filed against him.

On March 1, 1967, at approximately 7:30 p.m., and at a time much subsequent to the time that plaintiff was placed under arrest, the defendants caused to be issued, a warrant for the search of plaintiff's residence. The application for the search warrant was based on an affidavit by Louis Ivon of Garrison's staff. Ivon's affidavit is based on Perry Raymond Russo's story and the plaintiff is repeatedly referred to in that affidavit as "Clay Shaw alias Clay Bertrand." (Dean Andrews, a New Orleans lawyer testified before the Warren Commission that shortly after the assassination, a shadowy figure named Clay Bertrand appealed to him to go to Dallas and defend Lee Harvey Oswald.) In due course, representatives of the defendant Garrison, led by the defendant Alcock, conducted a lengthy search of plaintiff's residence and seized a considerable amount of personal property belonging to him.

Plaintiff asserts that his constitutional rights, under the Fourth and Fifth Amendments of the Constitution of the United States, were violated by the issuance of said search warrant, the search of his residence pursuant to said warrant, and the seizure of his property pursuant to said warrant, in that: (a) the property was not seized incidental to a valid arrest and/or search; (b) plaintiff was arrested prior to the issuance of the warrant; and (c) the search warrant was not issued on probable cause.

When the fact of Garrison's Kennedy assassination probe was made public, he embarked upon a concerted campaign in the local, national and international press, over television, radio and other news media, to convince the public at large that John F. Kennedy was not killed by Lee Harvey Oswald or by any other lone assassin, but as the result of a well-planned conspiracy involving many individuals and many organizations. The number of alleged conspirators and the number of organizations involved in the conspiracy increased with each public utterance, each public appearance, each press conference, each press release and each interview. The fact of the Garrison Kennedy assassination probe, received in-depth coverage from the local, national and international news media. The leading critics and demonologists of the Warren Report wooed and won him, and he became closely allied with them in their frenetic attacks on the Warren Report. This in-depth, front-page news cover-

age reached a crescendo during the preliminary hearing instigated and held at the demand of Garrison.

On March 2, 1967, Garrison sought and obtained an order for a preliminary hearing on the charges filed against plaintiff. Such a move on the part of a prosecuting attorney is so unusual as to be unheard of. Prior, as well as subsequent, events established beyond a peradventure of a doubt that Garrison, in seeking a preliminary hearing on the charges filed against plaintiff, was motivated solely and only by a desire to maintain and keep alive, the in-depth news coverage which had commenced when the news of his assassination probe became public.

The in-depth, front-page news coverage of Garrison's assassination probe reached a crescendo during the preliminary hearing conducted in the Criminal District Court for the Parish of Orleans before three judges of that court. The preliminary hearing commenced on March 14, 1967, before three judges of the Criminal District Court for the Parish of Orleans and was concluded on March 17, 1967. Neither the Louisiana Code of Criminal Procedure nor the Rules of the Criminal District Court for the Parish of Orleans provide any procedure for the establishment of a three-judge court to hear any matter.

Plaintiff's arrest on March 1, 1967, was attended by great fanfare. One William Gurvich, the then chief investigator for Garrison's office, presented,

over all television and radio stations, a prepared statement in connection with the arrest. Garrison and his staff permitted television cameras and sound equipment to record and transmit plaintiff's conveyance, in handcuffs, from the office of the District Attorney to the police central lockup. The press and all news media were furnished with a detailed list of all of the property seized from the plaintiff's home. Most of the property seized was not even remotely relevant to the charges against the plaintiff. Life Magazine, a nationally circulated publication, was allowed to photograph all of the seized "evidence." A. circus-like atmosphere pervaded the courthouse and the surrounding area.

On March 8, 1967, plaintiff filed a motion to quash the order for the preliminary hearing and a motion for a bill of particulars to ascertain the essential and pertinent facts of the offense with which he was charged, asserting that he was being required to respond at a preliminary hearing to charges so vague and indefinite as to be in violation of his constitutional rights to be informed of the nature and cause of the charges against him, in contravention of Article I, Section 10, of the Constitution of the State of Louisiana, as well as in contravention and violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. These motions were summarily denied by the Court without written reason, as a result of which plaintiff did not know, until such time as said preliminary hearing had been concluded, any of

the details or particulars of the illegal actions allegedly committed by him.

The preliminary hearing commenced before the illegally constituted three-judge court on March 14, 1967, and was concluded on March 17, 1967. The principal witnesses introduced by the defendants to support the charges filed against the plaintiff were: Perry Raymond Russo, Vernon Bundy, Dr. Esmond Fatter and Dr. Nicholas Chetta.

Perry Raymond Russo testified on direct examination by the Defendant Garrison that he had first met David W. Ferrie (plaintiff's alleged co-conspirator) in 1963. Russo had been trying to extricate a young friend from Ferrie's influence at the request of his friend's parents. According to Russo, Ferrie became enraged at his efforts to extricate the friend and once threatened to kill him. Later, however, they became friends. Russo identified Lee Harvey Oswald as a man he had known as Ferrie's roommate under the name of Leon Oswald. Russo said he saw Oswald in the summer of 1963 with Ferrie at Ferrie's apartment and that on one occasion Oswald was polishing a rifle with a telescopic sight mounted on it. According to Russo, Oswald was surly and antagonistic toward him. Russo identified Clay Shaw as a man he had seen three times. According to him, the first time was during a visit by the late President John F. Kennedy to New Orleans, when he saw the plaintiff in a crowd. The third time was in a car with Ferrie after the assassination.

According to Russo, his second meeting with plaintiff was at a party at Ferrie's apartment in the middle of September, about two months before President Kennedy was killed. He said he had just "dropped in" and found eight of nine people there having a party. The other members of the party left, leaving Russo alone with "Clem Bertrand"—whom he identified as the plaintiff herein, Clay Shaw—Oswald and Ferrie. After the others left, said Russo, Oswald, Ferrie and Bertrand began openly discussing the assassination of President Kennedy. According to Russo, Ferrie took the initiative and discussed diversionary shots. He said there would be two or three people involved and one would have to be the scapegoat while the others made the "good shot". The three discussed a plan to escape by plane to Brazil via Mexico, or directly to Cuba. The only reference to Russo's presence during the discussion was at the outset. Oswald said, "What the hell is he doing here?" According to Russo, Ferrie replied that Russo was "all right—he doesn't know anything." Russo declared that he had taken no part whatsoever in the plot. It should be noted here, however, that if, as is alleged, this meeting did constitute a conspiratorial meeting, Russo was part of said meeting. Russo has not been charged, or named as a co-conspirator.

On cross-examination, Russo conceded that he had not identified a picture of Lee Oswald as "Leon Oswald" until members of Garrison's staff had sketched a series of beards on it. He acknowledged

that he had seen Bertrand once, and Ferrie numerous times, after the assassination and never did question them about the alleged murder plot or about the man named Oswald whom he had testified as having seen at Ferrie's apartment with a rifle. According to him, he did not come forward with his story in the three years since the assassination for a variety of reasons—he had confidence in the FBI—which had reported only that Oswald was involved in the Dallas killing—he was involved with school which was more pressing to him and "I never push myself off on anybody."

Russo was followed to the stand by Dr. Nicholas Chetta, the then Coroner for the Parish of Orleans, who testified that he had administered Sodium Pentothal—the so-called truth serum—to Russo. Dr. Esmond Fatter followed on the witness stand and said that he had interrogated Russo under hypnosis on three different occasions. According to these doctors, hypnosis could assist a witness in sharpening his memory and enabling him to recall past events.

The other prime accusatory witness was one Vernon Bundy, an admitted narcotics addict, who claimed that he did at a time when he was on a four-cap-a-day heroin habit, see two men whom he identified as the plaintiff herein, Clay Shaw, and Lee Harvey Oswald talking together at the lakefront. In addition to having admitted that he was a narcotics addict, Bundy admitted that he was a thief who had to steal in order to secure funds with

which to purchase the drugs which were so necessary to his habit.

The Warren Report was offered in evidence on behalf of plaintiff. The court regarded the offer as frivolous and summarily maintained the state's objection to the admissibility of the report.

At the conclusion of the four-day hearing, the court ruled that there was "probable cause" to hold plaintiff for trial.

According to competent psychiatrists, an expert in the field of hypnosis can lead a suggestible witness in any direction by improper questioning. Plaintiff asserted his ability to prove that Russo's testimony is pure fiction and that he testified as a result of post-hypnotic suggestion by Dr. Fatter, the defendant Garrison and other members of his staff. That Russo's character is such that he is completely lacking in credibility, that his testimony is replete with discrepancies and contradictions, as evidenced by his description of Lee Harvey Oswald as being very dirty and a beatnik-type individual, whereas all evidence contained in the Warren Report shows Oswald to have been a neat, clean and somewhat meticulous individual; that when first interviewed on February 25, 1967, by the defendant Garrison's assistant, Andrew J. Sciambra, Russo volunteered no information of any kind about Oswald, the plaintiff herein, Clay Shaw, Bertrand, or the alleged assassination plot at Ferrie's apartment.

On March 22, 1967, the defendant Garrison, acting in his capacity as the legal adviser of the Grand Jury for the Parish of Orleans, caused plaintiff to be indicted and charged with having willfully and unlawfully conspired with David W. Ferrie, Lee Harvey Oswald, and others, to murder John F. Kennedy. Plaintiff is informed and so believes that said indictment was returned by the Grand Jury, solely and only on the hallucinatory, drug-induced and hypnotically-induced testimony of Perry Raymond Russo, and none other. It is significant that all of the alleged co-conspirators are deceased.

The case was allotted to Section "C" of the Criminal District Court for the Parish of Orleans, Judge Edward A. Haggerty, Jr., presiding. In due course, there was filed on behalf of the plaintiff, through his counsel of record, an application and supplemental applications for bills of particulars, prayer for oyer, motion to quash the indictment, motion for the return of seized property, motion to suppress the evidence seized under the illegally issued search warrant of March 1, 1967, to which motions answers were filed on behalf of the state, asserting that the relief and/or the information sought should be denied.

On August 1, 1967, the Defendant Alcock filed a motion asking the court to fix the case for trial; this despite the fact that under the provisions of Article 702 of the Louisiana Code of Criminal Procedure, the docket of all Sections of the Criminal Court are un-

der the control of the Defendant Garrison and cases may be fixed for trial at his pleasure. No useful purpose was served or could be served by the filing of such a motion. The motion was filed solely and only for the purpose of publicizing defendants' attack on the Warren Report and in pursuance of the defendants' premeditated, well-calculated scheme to abuse and misuse the powers of their offices to conduct an illegal, unwarranted, fraudulent and useless probe of the Kennedy assassination. In this motion, Garrison alleged:

(a) That various agencies of the news media have set about in a deliberate and systematic fashion to destroy the state's case in this prosecution;

(b) That the conduct of the news media was designed, calculated or likely to have a prejudicial effect upon the minds of prospective jurors residing in Orleans Parish and that the continued subjection of the residents of Orleans Parish to said harmful, opinionated and false pre-trial publicity, so maliciously conceived, would have its intended effect by prejudicing the minds of prospective jurors;

(c) Allegations of misconduct as part of a plan to intimidate, compromise or abuse potential state witnesses, such as the aforesaid Perry Raymond Russo, were asserted against the National Broadcasting Com-

pany, WDSU-TV, and various other members of the news media;

(d) That witnesses who are fugitives from the State of Louisiana in the defendants' pending Grand Jury investigation (of the Kennedy assassination) have been given services of attorneys and aided in their flight in nefarious ways by undisclosed principals who are, in fact, members of news media working closely with governmental agencies;

(e) That false statements and charges designed to wreck the state's case had been made by government officials, members of the news media and private officials, such as:

1. The United States Attorney General, Ramsey Clark.
2. The Saturday Evening Post Magazine.
3. Newsweek Magazine.
4. The National Broadcasting Company.
5 Aaron Kohn.

On August 16, 1967, the trial court ruled on plaintiff's application and supplemental applications for particulars of the crime with which he is charged. The court denied that plaintiff was entitled to any of the information sought to be obtained by him other than that which had been revealed in the state's an-

swer to his motion for bills of particulars. It is significant that the state, in its answer to the application for particulars, added the name of another deceased individual to plaintiff's other deceased, alleged co-conspirators, i.e., Jack Ruby.

In its answer to the bill of particulars for the alleged overt acts committed by plaintiff and/or his co-conspirators in furtherance of the alleged conspiracy, the state denied that it was required to furnish all of the overt acts committed by any or all of the conspirators in furtherance of the conspiracy and that *some* of the acts committed by the conspirators are:

"(a) A meeting of Lee Harvey Oswald, David W. Ferrie and the Defendant Clay L. Shaw in the apartment of David W. Ferrie at 3330 Louisiana Avenue Parkway in the City of New Orleans during the month of September, 196[illegible];

"(b) Discussion of means and methods of execution of the conspiracy, to-wit:

The assassination of John F. Kennedy. Particularly the selection of the use of high-powered rifles being fired from multiple directions simultaneously to produce a triangulation of cross-fire. Establishing and selecting means and routes of escape from the assassination scene to a point outside the Continental United States. Determining of procedures and

places to be used for some of the principals to the conspiracy to establish alibis on the date of the assassination.

"(c) Clay L. Shaw traveling from New Orleans to Baton Rouge, Louisiana, in the fall of 1963 and there meeting Lee Harvey Oswald and Jack Ruby at the Capitol House Hotel and delivering to Lee Harvey Oswald and Jack Ruby a sum of money.

"(d) A trip to the West Coast of the United States by Clay L. Shaw during the month of November 1963.

"(e) A trip by David W. Ferrie from New Orleans, Louisiana, to Houston, Texas, on the day of November 22, 1963.

"(f) Lee Harvey Oswald taking his rifle from the home of Mrs. Ruth Paine in Irving, Texas, to the Texas School Book Depository in Dallas, Texas, on or before November 22, 1963."

The state further revealed that "Leon Oswald is one and the same person as Lee Harvey Oswald named in the indictment.....". That "Clem Bertrand is one and the same as Clay Shaw named in the indictment .....".

On September 12, 1967, a second supplemental motion to quash the indictment was filed and on Sep-

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tember 18, 1967, at the hearing on said motion, the motions to quash were denied. On September 27, 1967, a second supplemental application for particulars, as well as a motion for a continuance or a change of venue were filed. On October 16, 1967, a hearing was had on plaintiff's second supplemental application for particulars and on the motion for a continuance or change of venue. The application for particulars was denied. At the suggestion of Garrison and Alcock, the court ".....granted a continuance for a reasonable time, that is, until February 1968."

On February 19, 1968, a motion for a change of venue was filed. The state answered asserting that plaintiff could obtain a fair trial in this jurisdiction and asking the court to deny the motion for a change of venue. The hearing on this motion commenced on March 5, 1968. At the outset of this hearing, the court heard arguments on the application of the plaintiff for the issuance of a writ of subpoena duces tecum to the Defendant Garrison calling upon him to produce various documents as set forth in Paragraph 32 of the complaint. The application for the issuance of said subpoena was summarily denied by the court without written reasons therefor. During and at the time the Defendant Alcock was in court strongly opposing plaintiff's application for the issuance of this subpoena, Garrison was in the process of issuing a press release in which he impugned the motives of plaintiff's counsel in a very vitriolic manner. Attached to the press release, which was hand-delivered to all news media by a representative of Gar-

rison's staff, while the court was still in the morning session, was one of the documents, access to which had been denied plaintiff by the defendants and by the court.

On April 4, 1968, plaintiff's motion for a change of venue, as well as his motion to re-open the evidentiary hearing, was denied by the trial court.

On April 4, 1968, plaintiff gave the trial court notice of its intention to apply to the Supreme Court of the State of Louisiana for writs of certiorari review, prohibition, and mandamus, and such other writs as might be necessary, from the aforesaid ruling of the trial court denying the motion for a change of venue. The application was filed on April 19, 1968, and denied on April 23, 1968. In denying the application, the court said:

> "Writs denied. This court will not interfere with the orderly proceedings in the trial court in the absence of a showing of irreparable injury. Relator has a remedy by appeal in the event of conviction."

The Louisiana Code of Criminal Procedure denies plaintiff the right to appeal from the trial court's judgment denying the motion for a change of venue. The application for writs of review was based on the supervisory jurisdiction of the Supreme Court over all inferior courts. Whereas the right of appeal is denied to plaintiff, it is not denied to the state. Had

the trial court granted plaintiff's motion for a change of venue, the state could have appealed from said judgment to the Supreme Court. In his complaint, plaintiff avers and demands judgment declaring and decreeing Articles 627 and 912 of the Louisiana Code of Criminal Procedure as being illegal, null and void, and unconstitutional, as being violative of his constitutional rights, as guaranteed to him by the First and Fourteenth Amendments of the Constitution of the United States.

In denying plaintiff's motion for a change of venue, the trial court refused and failed to apply the mandate of the United States Supreme Court on such matters and based its denial of said motion on Articles 433 and 434 of the Louisiana Code of Criminal Procedure and the Louisiana jurisprudence pertaining thereto. Plaintiff alleges the unconstitutionality of Articles 433 and 434 as being repugnant to and violative of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Despite the fact that plaintiff has sought through various applications for particulars to obtain the identity of all of his alleged co-conspirators, defendants, aided and abetted by the trial court through its refusal to recognize and apply the jurisprudence with regard to such matters as delineated by decisions of the United States Supreme Court, have not disclosed to him the identity of all of his alleged co-conspirators. The alleged additional co-conspirators are referred to in the indictment as ".....and others."

Plaintiff avers that the suppression by the defendants of the identity of each and every one of his alleged co-conspirators, the precise time and the precise place and the nature of all of the acts allegedly committed by him in furtherance of the alleged conspiracy, violates the letter and the spirit of due process of law under the Fourteenth Amendment to the Constitution of the United States, as well, as a deprivation of due process of law under the Fourteenth Amendment, and has been held to be such by numerous decisions of this court. Plaintiff avers that Articles 484 and 485 are vague, indefinite and lacking in terms susceptible of objective measurement, and as such are repugnant to and violative of the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Under the provisions of Article 434 of the Louisiana Code of Criminal Procedure, the proceedings had before the Orleans Parish Grand Jury which returned the indictment against plaintiff are secret and no procedure is provided for by state law by virtue of which plaintiff can obtain, for the purposes of cross-examination, a transcript of the hallucinatory and drug-induced testimony adduced from Perry Raymond Russo before said Grand Jury; nor can he obtain a transcript of the testimony of any other individual who may have appeared before said Grand Jury and which testimony was the basis for the indictment filed against plaintiff. Plaintiff claims the unconstitutionality of Articles 433 and 434, as interpreted and applied by the District and Appellate Courts of the

State of Louisiana, to be repugnant to and violative of the First, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States.

Plaintiff asserts he is entitled to the information set forth in Paragraph 63 of the original complaint for the purpose of adequately preparing his defense of the state court charges in the event the injunctive relief herein sought is denied. State law provides no discovery procedure in criminal matters.

Plaintiff alleges the unconstitutionality of the conspiracy statute allegedly violated by him, i.e., LRS 14:26. It is asserted that said statute is vague and indefinite and that it is written in broad, sweeping, general and very indefinite language; that it is lacking in terms susceptible of objective measurement, as a result of which said statute, on its face, violates the First and Fourteenth Amendment guarantees, securing freedom of expression, because overbreadth makes them susceptible of sweeping and improper application abridging those rights. Plaintiff further seeks judgment declaring the unconstitutionality of Article 782 of the Louisiana Code of Criminal Procedure on various grounds, and in particular, on the basis that the crime with which he is charged is a "serious offense." That Article 782 requires a verdict of only nine of the twelve jurors. That a unanimous verdict in the case of the serious crime as distinguished from the less serious crime which requires a unanimous verdict under the provisions of Article 782, is discriminatory and a denial of the equal pro-

tection of the laws as guaranteed by the First, Sixth and Fourteenth Amendments of the Constitution of the United States.

The plaintiff asserts that on or about November 25, 1966, the Defendant Garrison, aided and abetted by the Defendants Alcock and Ward and other members of the District Attorney's staff, embarked on a premeditated and well-calculated scheme to use the powers of their office, as well as those of the Criminal Courts for the Parish of Orleans, to conduct an illegal, unwarranted, fraudulent and useless probe of the assassination of the late John F. Kennedy, President of the United States. That the primary purpose and the ultimate objective of the defendant's activities in connection with their alleged Kennedy assassination probe is to discredit the Warren Report and its findings, and not to objectively determine the involvement if any there is of plaintiff. That plaintiff was arrested and subsequently indicted in order to obtain court authority for the defendant's political activity and his activities as a critic of the Warren Report. That from the very inception of plaintiff's arrest on March 1, 1967, the Defendant Garrison, as well as the Defendants Alcock and Ward, have acted in bad faith in the arrest of plaintiff, and not with any hope of ever obtaining a valid conviction. That from the very inception of their alleged Kennedy assassination probe, the defendants have misused and abused the legal processes of the State of Louisiana under color of authority of their office and through the use of the Criminal Courts of the Parish

of Orleans, as a result of which the fundamental, civil and constitutional rights of all citizens, and in particular, those of your plaintiff have been violated and obliterated. That the conduct of the defendants has imperiled the security of the country itself.

It is an established fact without need of proof that the Defendant Garrison's Kennedy assassination probe has received in-depth, front-page coverage from the local, national and international news media. That any and all actions of the Defendant Garrison and/or the other defendants had in connection with the Kennedy assassination probe is "news" and receives front-page coverage. That since the fact of said probe was made public, the Defendant Garrison has held numerous press conferences and issued numerous press releases in connection with all matters pertaining to said probe, as well as in connection with matters pertaining to the case of State vs. Shaw, and that all of said public utterances relate either directly or indirectly to the charges presently pending against your plaintiff. The Defendant Garrison, on more than one occasion, has stated publicly that he will lose no cases arising out of said probe, and on more than one occasion, has publicly stated and has been quoted as saying: "There is no way that Clay Shaw can get an acquittal." During the course of his public attacks on the Warren Report, Defendant Garrison has attacked every conceivable person or organization, including the President of the United States, the Attorney General of the United States, and the Chief Justice of the United States

Supreme Court. He has been quoted on more than one occasion of accusing the President of the United States as being "an accessory after the fact in the assassination of the President." Defendants, in their capacity as legal advisers to the Orleans Parish Grand Jury and in furtherance of their scheme and calculated misuse of the state processes, have caused Grand Jury subpoenas to issue to those whom they seek to interview in connection with their alleged Kennedy assassination probe under threat of criminal prosecution for failure to appear. The individuals subpoenaed are not under investigation and have no knowledge of the commission of any crime then properly under investigation by the Grand Jury for the Parish of Orleans. That the Grand Jury processes are improperly and illegally used to subpoena and harass witnesses, through threat of indictment or the filing of criminal charges, to obtain evidence against your plaintiff. The Defendant Garrison seeks to convince the public that President Kennedy was killed as a result of a conspiracy and not by a lone assassin, as reported by the Warren Report. That by means of his repeated public attacks on the Warren Report, he seeks to convince the public of the existence of a conspiracy in the death of the President, thus prejudicing, conditioning and influencing the minds of the public as to the guilt of Clay Shaw and thus obviating the necessity of his having to prove the existence of a conspiracy during the trial of said case on its merits.

In all hearings had in the trial court on preliminary motions filed on behalf of plaintiff, defendants have steadfastly maintained that for evidentiary purposes in the case of "State of Louisiana vs. Clay L. Shaw", there was no connection between:

(1) The assassination of John F. Kennedy in Dallas, Texas, on November 22, 1963;

(2) The Warren Commission Report;

(3) The Garrison Probe of the Assassination of John F. Kennedy; and

(4) The Case of State of Louisiana vs. Clay L. Shaw.

This position has been maintained by the trial court. These representations made to the court are absolutely false and untrue, constitute a gross misrepresentation of the facts, and in due course were admitted in open court to be false and untrue. They were made in furtherance of the defendants' calculated scheme to misuse and abuse the state processes, as a result of which the civil and constitutional rights of your plaintiff have been violated.

Plaintiff seeks judgment decreeing the validity of the Warren Report and its conclusions of fact, as well as its admissibility in evidence in all courts, and in particular, in the Criminal District Court for the Parish of Orleans.

The plaintiff claims that his First Amendment rights, which are basic to his freedom, are imperiled by the calculated, deliberate state assault through the misuse and abuse of the prosecutorial powers of the defendants, and that a successful defense of the state criminal proceedings will not assure adequate vindication of his First Amendment rights to freedom of expression and freedom of movement.

The plaintiff asserts that as a result of the aforesaid circumstances, conditions and facts, he has in the past and will in the future, continue to suffer irreparable injury, clear and imminent, if the relief herein sought is not granted; that these are extraordinary circumstances and his civil and constitutional rights cannot be protected under any procedures provided for by Louisiana law.

X. THE QUESTION OF WHETHER 42 USC, SECTION 1983, IS AN EXPRESS EXCEPTION TO THE INJUNCTION BAR OF 28 USC, SECTION 2283 (1), IS A SUBSTANTIAL QUESTION, AS HAS BEEN RECOGNIZED BY THIS COURT IN PREVIOUS DECISIONS; (2) HAS DIVIDED THE CIRCUIT COURTS AS WELL AS THE LOWER COURTS; AND (3) REQUIRES IMMEDIATE DEFINITIVE DETERMINATION BY THIS COURT.

1. This Court has recognized that the issue of whether 28 USC, Section 2283, bars an injunction in an action grounded on 42 USC, Section 1983, is a serious and substantial question.

This court in its per curiam in *Cameron vs. Johnson*, 381 U.S. 741-42, specifically ordered the three-judge court to consider the question. The remand order was unanimous. The court recognized the crucial nature of the relationship of the Federal anti-injunction statute and the civil rights act causes of action. In its order, the court said:

> "On remand, the district court should first consider whether 28 USC, Section 2283 (1958 ed.) bars a Federal injunction in this case, see 380 U.S. at 484, n. 2."

The dissenting justices considered the issue so pressing as to require immediate settlement by the Court. Mr. Justice Black, joined by Justices Harlan and Stewart, wrote:

> "The question of applicability of Section 2283 is here on appeal and if the Court is uncertain about that statute's application here, it has the duty to decide the question now and not remand to the lower court which has already decided it." 381 U.S. at 747.

and Mr. Justice White wrote:

> "As the Court recognizes, the question whether Section 2283 bars an injunction in suits brought under 42 USC Section 1983 . . . . is an open one. I think that the presence of that issue is a further reason why a per curiam remand is inappropriate." 381 U.S. at 759, fn.2.

On remand, the three-judge district court conducted an evidentiary hearing and again dismissed the complaint. 262 F.Supp. 873. The Court affirmed the decision of the lower court. 88 S.Ct. 1335. On remand, the district court held that the state statute under attack was not void on its face and rejected the contention that it was so broad, vague, indefinite, and lacking in definitely ascertainable standards, as to be unconstitutional on its face. The district court, acting in accordance with this Court's per curiam of remand to reconsider the case in light of *Dombrowski*, found that the complaint failed to show sufficent irreparable injury as to justify injunctive relief. This, after an evidentiary hearing. In denying injunctive relief, the district court said;

> "That there was no harassment, intimidation or oppression of these complainants in their efforts to exercise their constitutional rights, but they were arrested and they are being prosecuted in good faith for their deliberate violation of that part of the statute which denounces interference with the orderly use of courthouse facilities by all citizens alike." 262 F.Supp. 876.

This Court affirmed *Cameron vs. Johnson*, but did not find it necessary to resolve the question whether suits under 42 USC, Section 1983, come under the expressly authorized exception of Section 2283.

Prior to *Cameron vs. Johnson*, the question was raised before this Court in *Dombrowski vs. Pfister*,

380 U.S. 479. It was unnecessary for the Court to reach the question, as the injunction proceedings has served only to intensify the seriousness of the state court proceedings. The Court specifically left the question open. 380 U.S. at 484, fn.2.

The question is before the Court once again. Time has served only to intensify the seriousness of the question and the need for this Court to resolve the conflict which exists in the decisions of the lower courts. The Federal injunctive relief provided for by *Dombrowski* is being invoked with increasing frequency with each passing day by those who require the protection of federally-guaranteed constitutional rights which are being violated by state public officials through the misuse and abuse and the improper utilization of state criminal statutes, and in particular the court from which this appeal emanates. *Carmichael vs. Allen,* 267 F.Supp. 985 (1967); *Stamler vs. Willis,* 371 F.2d 413; *Chandler vs. Garrison,* C.A. 67147 E.D. La. March 11, 1968; and *Sheridan and Townley vs. Garrison,* 273 F.Supp. 673 (E.D. La. 1967). Once again, the question is presented to the Court and it is submitted that having previously recognized the importance of the question, the Court should now proceed to decide whether suits under 42 USC, Section 1983 constitute an expressly authorized exception to 28 USC, Section 2283.

2. Numerous Circuit Courts and District Courts have rendered conflicting opinions as to whether or not an injunction to stay pending proceedings in a

state court is expressly authorized by 42 USC, Section 1983.

Section 1983 specifically grants an equitable remedy against action "under color of" a state statute which subjects "any citizen or other person to the deprivation of any rights, privileges or immunities secured by the Constitution and laws." The issue which is presented to this Court and which must be decided by this Court, is whether this provision for equitable relief, constitutes an express authorization to the Federal Courts to grant injunctive relief and is therefore an exception to the bar of Section 2283. There can be no doubt but that the United States District Court and Circuit Courts of Appeals are hopelessly in conflict in their respective responses to the question.

It is now well established that in order to constitute an exception to the bar of Section 2283 a statute need not, by its very terms, refer to Section 2283, *Dombrowski vs. Pfister, supra:* "Federal injunctions against state prosecutions in civil rights cases..... a new trend in Federal-State judicial relations" by Bradley R. Brewer, 34 Fordham Law Review, 71; *Baines vs. City of Danville,* 337 F.2d 579 (1964); *Cooper vs. Hutchinson,* 184 F.2d 119 (3 Cir. 1950).

The Third Circuit has held without explanation of its rationale that Section 1983 is an exception. *Cooper vs. Hutchinson,* 184 F.2d 119 (1950); *Tribune Review Publishing Company vs. Thomas,* 153 F.Supp.

486 (1957). The Sixth and Seventh Circuits again with some, but not in-depth explanation, held that Section 1983 was not an exception to Section 2283. *Smith vs. Village of Lansing,* 241 F.2d 856 (7 Cir. 1957); *Goss vs. Illinois,* 312 F.2d 257 (7 Cir. 1963); *Sexton vs. Barry,* 233 F.2d 220 (6th Cir. 1956). The Fourth Circuit, in *Baines vs. City of Danville,* 337 F.2d 579, in a split decision, held that Section 1983 was not an express exception. The Fifth Circuit is divided on the question. *Cameron vs. Johnson, supra, Cox vs. Louisiana,* 348 F.2d 750 (5th Cir. 1956); *Cox vs. Louisiana* wherein Judge Wisdom said:

> "A civil complaint asserting such an abuse of the prosecutorial function would state a claim under the civil rights act 42 USC Section 1983, and justify injunctive relief. Dombrowski vs. Pfister, 1965, 380 U.S. 479, 85 S.Ct. 116, 14 L.ed.2d 22. This is not a Douglas vs. City of Jeannette, Stefanelli or Cleary vs. Bolger situation."

With the passage of time 42 USC, Section 1983, and the relief afforded by it has become an extremely important, useful and practical remedy for the protection of federally-guaranteed constitutional rights. Congress intended, in the enactment of Section 1983, to assert and declare Federal supremacy over state court proceedings for the use and benefit of those who have a cause of action under Section 1983. This Court, in *Dombrowski vs. Pfister, supra,* ratified and affirmed the following very illuminating statement

of Judge Wisdom of the Fifth Circuit in *Cox vs. Louisiana, supra:*

> "The general principle basic to American Federalism that United States Courts usually should refrain from interfering with the state courts enforcing local laws is unassailable. But the sharp edge of the supremacy clause cuts across all such generalizations. When a state, under the pretext of preserving law and order, uses local laws valid on their face to harass and punish citizens for the exercise of their constitutional rights or federally protected statutory rights, the general principle must yield to the exception: The Federal System is imperiled."

The lower court reviewed the jurisprudence in some depth but refused to pass on the question, terming it a "very difficult legal question and one which is 'largely academic' ". It is apparent from an analysis of the lower court's decision that it preferred to follow the age-old and antiquated concepts of federalism; and felt that the need to maintain the delicate balance between state and national authority is paramount. The lower court relied on *Stefanelli vs. Minard,* 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951) and *Cleary vs. Bolger;* 371 U.S. 392, 83 S.Ct. 895, and the fears expressed therein against bypassing the state courts by seeking relief from the federal court system.

Later in the opinion, the court says plaintiff's request is premature and that "under our system of

federalism in the circumstances presented here, he must first seek vindication of his rights in the state courts as to this pending prosecution. In effect, the court has said that Section 2283 bars injunctive relief from a pending state court proceeding and Section 1983 is not an exception thereto. The lower court disregarded or overlooked the fact that since *Stefanelli*, this Court has in fact, not only expressed its great concern for the protection of personal rights, but has done much about it as evidenced by its recent decisions on such subjects as the right to counsel, the selection of juries, the trial court atmosphere, the right to trial by jury, etc. Long-standing judicial fictions and previously untouchable problems have been re-examined in the light of the realities of today, and not yesterday. The rules have been changed where the purposes they designed to achieve were not accomplished. This change continues, these new concepts of federalism continue, as is evidenced by this Court's decision in *Duncan vs. Louisiana.* The balance and perhaps the structure itself, of the federal-state judicial framework has been changed. This the lower court failed to recognize and thus abused its discretion. *Dombrowski vs. Pfister, supra; Miranda vs. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966); *Escobedo vs. Illinois,* 378 U.S. 478, 84 S.Ct. 1758 (1964); *Malloy vs. Hogan,* 378 U.S. 1, 84 S.Ct. 1489 (1964); *Duncan vs. Louisiana,* 88 S.Ct. 1444 (1968); *Bloom vs. Illinois,* 88 S.Ct. 1447 (1968).

3. The question requires immediate determination by this court.

Section 1983 provides a significantly important federal cause of action and imposes a mandate on the federal courts to intervene in state proceedings to safeguard the rights of its citizens whose federally-guaranteed constitutional rights are being violated by the state through its public officials acting in bad faith, misusing and abusing the powers of their public office. *Dombrowski* established a new concept of federalism, which the lower court failed to recognize and failed to follow. It is no longer improper or "inconsistent with our federal framework" for the federal courts to interfere with bad faith misuse of state criminal laws and their administration.

Having recognized the importance and the seriousness of this very substantial question, the Court should now resolve it, so that Section 1983 can be utilized. There is urgent need of it for the protection of the rights of the individual.

XI. THE HOLDING OF THIS COURT IN DOMBROWSKI vs. PFISTER AND THE RELIEF THEREIN PROVIDED IS NOT LIMITED TO THE PROTECTION OF FIRST AMENDMENT RIGHTS.

The Court's decision in *Dombrowski* is frequently interpreted as being limited to: (1) First Amendment rights' cases; (2) State statutes attacked as being unconstitutionally vague on their face; (3) Cases where the federal action was commenced prior to the formal institution of state criminal proceeding. There is no basis for limiting the application of *Dombrowski* to any one of these three holdings.

Certainly, there are other fundamental rights beyond the First Amendment which are equally as valuable, equally as precious as First Amendment rights. The lower court in its holding, did restrict *Dombrowski* and the relief therein provided for, to the protection of First Amendment rights only. No reason is given, stated, or indicated for its action, although the possibility of such a narrow interpretation by the court was recognized by Judge Heebe in his reasons for the issuance of the temporary restraining order, which was issued by him without a hearing. To so limit the holding in *Dombrowski*, is, as was stated by Judge Heebe, to dilute the major and fundamental premises of the decision. Other federal rights should be entitled to equal protection. Why, by what reasoning, is a deprivation of a citizen's First Amendment rights, freedom of expression, freedom of press, freedom of speech, freedom of religion, more vital, more important, worthy of more consideration, entitled to considerably more protection, to the constitutional provision and guarantee that no person shall be deprived of his life, liberty, or property for arbitrary reasons, i.e., without due process of law. The constitutionality of Article 782 of the Louisiana Code of Criminal Procedure, *supra*, has previously been upheld by the Supreme Court of the State of Louisiana in the case of *State vs. Stanford*, 204 La. 439, 15 So.2d 817 (1943). In the light of this court's decisions, in *Maxwell vs. Dow, supra, Duncan vs. State of Louisiana, supra,* and *Bloom vs. State of Illinois, supra,* this article of the Louisiana Code of Criminal Procedure is obviously unconstitutional. If in the past there was some doubt

in the minds of jurists that the Sixth Amendment was binding upon the individual states by virtue of the Fourteenth Amendment, that doubt was certainly resolved by the Supreme Court in the *Duncan* case. Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. This was so held by the Supreme Court in *Andres vs. U.S.*, 333 U.S. 740, 68 S.Ct. 880, as well as in *Maxwell vs. Dow, supra.* If plaintiff is required to stand trial in the Criminal District Court for the Parish of Orleans, he will be tried by a jury of twelve, only nine of whom must concur in order to reach a verdict. Only this Court can prevent such an occurrence. Certainly this Court, in its continuing policy of providing practical and realistic protection for the constitutional rights of the citizens of this country, will not revert from that policy and limit its decision in *Dombrowski* to the protection of First Amendment rights only.

Those who seek to limit the holding in *Dombrowski* to situations where there are no state criminal proceedings pending, are unrealistic, and do not realize or recognize the full import of the doctrine established by *Dombrowski.* It is clear that when this court rendered its decision in *Dombrowski,* the State of Louisiana was doing something to Dombrowski and the other plaintiffs under two indictments. All concerned, the Supreme Court of the State of Louisiana, the plaintiffs themselves, and the judges of the state district court regarded the proceedings in *Dombrowski* as pending criminal proceedings. Whatever Mr. Garrison was doing to the plaintiffs in *Dombrow-*

ski, was ended when the State Supreme Court issued its ruling and declared the indictments null and void. It is submitted that at least from the point of view of common understanding, there were criminal proceedings pending in *Dombrowski*, and that this court ended those proceedings when it issued a decree restraining prosecution of the "pending indictments against the individual appellants . . ." To say that the citizen's right to the relief provided for by *Dombrowski* is no longer available once he has been indicted by the state court processes, is to be unrealistic. Certainly, this court will not vitiate the rationale of its decision by holding that the rights of those who win the race to the courthouse, are deserving of better protection than the rights of those who lose the race. Certainly there is nothing contained in Section 1983 which would support such a limitation of the relief therein provided. This court, having again expressed its concern for the protection of personal fundamental rights through prompt and realistic procedures, will not allow its actions to be impeded and to be rendered sterile by such an unrealistic interpretation of this very important and far reaching decision.

This court, in *Dombrowski*, recognized the devastating affect of the miuse and abuse of state criminal machinery on federally-guaranteed constitutional rights. This court reaffirmed the duty of the federal courts to act and to intervene in a situation, as that presented by the facts of this case, where prosecutions are brought in bad faith without hope of obtaining a valid conviction. "The chilling affect upon the

exercise of First Amendment rights may derive from the fact of prosecution unaffected by the prospects of its success or failure." The same is true when other rights are jeopardized, and other rights are violated, by an unethical and unscrupulous public prosecutor who has no regard for the canons of ethics and who has repeatedly exhibited his utter contempt for the American judicial system and all of its component parts.

Dombrowski is but a further extension of this Court's recognition that the federal courts are the prime protectors of federally-guaranteed rights as enunciated with the line of cases starting with *Gideon vs. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, *Miranda vs. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966) and its forerunner, *Escobedo vs. Illinois*, 378 U.S. 478, 84 S.Ct. 1758 (1964), *Malloy vs. Hogan*, 378 U.S. 184 (1964), *Bloom vs. Illinois, supra*, and *Duncan vs. Louisiana, supra*.

XII. THE "SPECIAL CIRCUMSTANCES" REQUIRED BY DOMBROWSKI ARE PRESENT IN THIS CASE AND INJUNCTIVE RELIEF IS PROPER.

Plaintiff has asserted that the charge of conspiring to assassinate John F. Kennedy is utterly groundless and was brought by Garrison in bad faith, solely and only to obtain a judicial forum for his attacks upon the Warren Report. The lower court said:

> "If the plaintiff's contentions are true, the defendant's conduct in this case would constitute serious bad faith."

In bringing *Dombrowski* within a "special circumstances" exception against enjoining state criminal prosecutions, the court established a new concept of federalism. This court has indicated by its holding in *Dombrowski*, that a federal injunction against a groundless and malicious state prosecution, is not inconsistent with established principles of federalism. The facts and special circumstances presented by this case, like those in *Dombrowski*, make it "an unusual one". It is clear from the facts and circumstances of this case, that the lower court erroneously assumed that the plaintiff's fundamental personal rights would be protected in the state court. The facts and circumstances alleged here show that they are "special circumstances", not unlike those presented in *Dombrowski*. The facts alleged show that plaintiff's fundamental personal rights have not been, and will not be, protected in the state court. The District Attorney has repeatedly made the public statement:

> "There is no way that Clay Shaw can get an acquittal."

as well as other statements indicating to the public that plaintiff is guilty of the charges filed against him. The lower court has refused to follow numerous decisions of this Court which establish plaintiff's constitutional rights to a fair trial in an atmosphere free of prejudice and violence, by denial of al preliminary motions filed on his behalf. Plaintiff has been denied a change of venue, although un-

der the principles established by this Court in *Sheppard vs. Maxwell*, 86 S.Ct. 1507 (1966) and *Estes vs. State of Texas*, 85 S.Ct. 1629, he is clearly entitled to that relief; and the lower court has been sustained by the Supreme Court of the State of Louisiana.

If forced to trial in the state court, plaintiff will be tried before a jury of twelve, only nine of whom must concur to reach a verdict. Such a procedure is contrary to this Court's decisions in *Duncan vs. Louisiana*, 88 S.Ct. 1444 (1968) and *Bloom vs. Illinois*, 88 S.Ct. 1477 (1968), as well as *Maxwell vs. Dow*, 176 U.S. 581, 20 S.Ct. 448 (1900). It is not a mere possibility—it is an established fact that the state court will not protect plaintiff's fundamental personal rights. According to Garrison, he is not bound by the "guidelines" issued by the state court relative to pre-trial publicity. The facts and circumstances alleged in plaintiff's complaint clearly establish the need of a federal injunction to protect his fundamental constitutional rights from irreparable injury and that the "special circumstances" required by *Dombrowski* are present here. The allegations of the complaint clearly "depict a situation in which defense of the state's criminal prosecution will not assure adequate vindication of constitutional rights."

This complaint, as in *Dombrowski*, alleges far more than "injury other than that incidental to every criminal proceeding brought lawfully and in good faith". The lower court not only acknowledged

the allegations of bad faith prosecution, but said that if proven, they would constitute "serious bad faith". Nothing other than the allegations contained in the complaint were before the court for its consideration since no evidentiary hearing was conducted. For the purpose of the defense motion of failure to state a complaint upon which relief could be granted, the court was, therefore, bound to consider the matter in light of the "serious bad faith" of the defendant, the state public prosecutor.

In *Dombrowski,* this court recognized that serious and irreparable injury is often caused to litigants and to the rights of all citizens by the oftentimes ponderous, painful and slow operation of the wheels of justice. Such a situation confronts plaintiff in this case. When state courts fail to perform their duties under the Constitution to teach restraint to over zealous prosecutors, this Court has said that the federal courts should, and must, act to protect the citizen's fundamental rights. Those "special circumstances" are presented in the allegations contained in the complaint filed on behalf of plaintiff. The "misuse and abuse" of the powers vested in this public prosecutor, and the conduct of his fraudulent and useless probe of the assassination of John F. Kennedy, requires federal intervention. Only through federal intervention can this plaintiff's fundamental personal rights be protected.

The "chilling effect" on plaintiff's fundamental rights is derived from the misuse and abuse of the

prosecutorial powers vested in Garrison, the use of these powers without any hope of obtaining a valid conviction, and their misuse solely and only for the purpose of obtaining a judicial forum for his attacks upon the Warren Commission. In the words of the Honorable Ramsey Clark, Attorney General of the United States: "Garrison has taken a good man and ruined him, for his own personal aggrandizement."

The facts of this case not only constitute special circumstances justifying injunctive relief, but more explicitly, extraordinary circumstances the like of which and the substance of which have never before been presented to any court.

Plaintiff does not complain and seek injunctive relief based on the mere possibility of erroneous application of the Louisiana Conspiracy Statute; nor is it contended, as was the situation in *Cameron,* that there is a possibility of erroneous application of the statute and that such erroneous application constitutes the irreparable injury necessary to justify injunctive relief as exemplified, warranted and required under the mandate of *Dombrowski;* nor do the actions complained of constitute those injuries which necessarily flow from any criminal prosecution; nor does he complain merely of the fact that he has been charged with the crime of conspiracy. Quite to the contrary, the thrust of plaintiff's complaint is the manner, the method, and the procedures used by the defendants, aided and abetted by the state court, prior to and since the time of his

arrest. Plaintiff complains of the abuse and the misuse of the prosecutorial powers invested in defendants by virtue of the public offices which they hold, as expressed and exemplified through his arrest, charge and indictment, in the manner and as set forth in the complaint as amended. This is not an ordinary criminal case. The Warren Commission, after the most thorough investigation of any crime ever committed, concluded that Lee Harvey Oswald, acting alone and not in concert or conspiracy with any other person, murdered and assassinated John F. Kennedy, the late President of the United States. Millions of citizens of the United States witnessed on television the murder of Lee Harvey Oswald by Jack Ruby, as well as the subsequent arrest and incarceration of Jack Ruby, now deceased. As a result of a fraudulent, illegal and useless probe conducted by the District Attorney for the Parish of Orleans, using improper and illegal methods, seeking and obtaining in-depth national and international publicity of all of his activities in connection with that probe, plaintiff has been charged and indicted with conspiracy to murder John F. Kennedy and asserts that he is being used as a vehicle by the Defendant Garrison to the judicial forum which he seeks for his irresponsible and oftentimes irrational criticisms of the Warren Report. It is submitted that under no circumstances, under no reasoning, under no hypothesis, can this case be said to constitute "any ordinary criminal proceeding". Plaintiff, who avows his innocence to such an extent that he cannot assist his counsel in the defense of the charges

filed against him for the simple reason that he did nothing, and defendants refuse to tell him what he did, is THE only person ever accused and charged in a court of law in connection with the assassination of President Kennedy. At the same time, plaintiff acknowledges the accuracy and the correction of the statement made in *Cameron* to the effect that the question for the court to determine is not the guilt or the innocence of the person charged. To the contrary, the question is whether plaintiff has been charged with a violation of the criminal law of the State of Louisiana in bad faith and with no expectation of a conviction, and have his federal rights been violated.

In *Cameron,* Justice Brennan said of the court's decision in *Dombrowski:*

> "Federal interference with a state's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework and a showing of special circumstances beyond the injury incidental to every proceeding brought lawfully and in good faith is requisite to a finding of irreparable injury suffiicent to justify the extraordinary remedy of injunction. 380 U.S. at 484. We found such special circumstances in Dombrowski."

The complaint, as amended in these proceedings, shows "special circumstances". The complaint in these proceedings alleges and shows that the action

brought against the plaintiff was not brought in good faith. All of the elements of *Dombrowski* are presently extant in the plaintiff's complaint as amended. The dissenting opinion in *Cameron,* written by Justice Fortas, labels *Dombrowski* as "strong medicine". We agree. We submit that the plaintiff in these proceedings has an "ailment" which requires "strong medicine." Judge Heebe, in his reasons for the issuance of the temporary restraining order, recognized the "illness" of the plaintiff and the threat of irreparable injury, clear and imminent, as well as the right to relief along the lines provided by *Dombrowski.* Judge Heebe said:

> "Given this state of the law, the real possibility of a determination in the plaintiff's favor by the three-judge court which, under the law, should be the court to determine the issue, and the irreparable harm which may accrue to the plaintiff by the initiation of his trial prior to the three-judge hearing, we think equity demands, and the proprietary interest of the federal courts authorize, whatever short delay of the state trial we now grant."

Judge Heebe recognized that the allegations contained in the complaint, if proven, "demand" equity. He recognized the existence of allegations which, if proven, would show irreparable harm, clear and imminent. It is submitted that the deliberate state assault which is referred to by Justice Fortas is readily apparent to even the casual reader of the

complaint. We agree with the Justice that *Dombrowski* should not be invoked when the state is, in substance and in truth, validly engaged in the enforcement of valid criminal law. We also agree with Justice Fortas that *Dombrowski* "means precious little, I submit, if the presumption supporting state action is not overcome by facts such as those before us now."

Justice Fortas did not agree with the findings of fact of the three-judge court and would have held on the facts presented that plaintiffs were entitled to *Dombrowski* relief. He would have also found the state statute to be unconstitutional and would have granted injunction.

Justice Harlan who bitterly opposed the remand of *Cameron* by the Supreme Court on June 7, 1965, recognized the right to injunctive relief under extraordinary circumstances where irreparable injury was clear and imminent when he said:

> "Dombrowski also indicates to me that there might be cases in which state or federal officers, acting under color of a law which is valid, could be enjoined from engaging in unlawful conduct which deprives persons of their federally-guaranteed statutory or constitutional rights. Compare 17 Stat. 13. 42 USC. Section 1983 (1958 Ed.)."

A three-judge court consisting of Circuit Judge Tuttle and District Judges Hooper and Smith rendered a decision in the case of *Carmichael, et al. vs. Allen,* 267 F.Supp. 985 (1967). The case arose out of an incident which occurred in Atlanta, Georgia, on September 6, 1966, at which time a near riot occurred and the actions of the chairman and other members of the Students' Non-Violent Coordinating Committee, in connection with that near riot, resulted in arrest and charges of various individuals. Jurisdiction for the complaint filed on behalf of Stokely Carmichael was, as is here alleged, except that the action was also brought under the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Complainants sought a judgment declaring unconstitutional, certain Georgia criminal statutes and an Atlanta city ordinance, and an injunction to prohibit a prosecution of the charges then pending against certain members of S.N.C.C. At the time of the hearing, there were pending indictments against the complainants.

In addition to the fact that there was a pending prosecution at the time of the filing of the complaint, it should also be noted that the three-judge court afforded the plaintiffs an evidentiary hearing.

In *Carmichael,* as in *Dombrowski,* as in this case, the state contended that it would be inappropriate for the Federal District Court to interfere with the orderly processing of state criminal prosecution.

The court relied on *Dombrowski*, and in particular, the following excerpt:

> "That the allegations in this complaint depict a situation in which defense of the state's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this court of any adverse determination. These allegations, if true, clearly show irreparable injury. 380, U.S. 479, 485, 85 S.Ct. 1116, 1120."

Not only did the court enjoin future prosecutions under the Georgia statute which it found to be unconstitutional, but it also enjoined those prosecutions which were then pending.

It is submitted that in view of the foregoing and most especially in view of the rationale of *Dombrowski*, Section 2283 does not bar the issuance of an injunction in this case so as to prevent injustice under the facts stated in this complaint as amended. That the doctrine of abstention based upon federal-state judicial comity is inapplicable since the lack of immediate action by this court will result in irreparable injury, clear and imminent, to the fundamental, constitutionally-guaranteed rights of this plaintiff.

XIII. A TEMPORARY RESTRAINING ORDER DID ISSUE WITHOUT A HEARING.

The validity of this complaint, the need for injunctive relief against the practices of this unethical public prosecutor, acting in bad faith without hope of obtaining a valid conviction, was recognized by Judge Heebe of the lower court when the case was allotted to his section. A number of exhibits were annexed to the complaint. However, it was not accompanied by a written offer of proof. A considerable amount but not all of the facts, were alleged in the complaint. Judge Heebe recognized the seriousness of the situation, the fraud being perpetrated by this public prosecutor, the numerous violations of plaintiff's constitutional rights, and issued a temporary restraining order without a hearing.

Judge Heebe recognized that plaintiff had suffered "irreparable injury, clear and imminent", and would continue to do so unless the defendant public prosecutor was enjoined. A temporary injunction could not have issued unless a permanent injunction was at least a reasonable possibility. Plaintiff was never afforded an opportunity to establish the need for a permanent injunction through the introduction of evidence at a hearing on his request for a permanent injunction. The lower court converted defendants' motion to dismiss, to a motion for a summary judgment, and dismissed plaintiff's case, despite the fact that no affidavits, and no offers of proof, were made on behalf of the defendant. A determina-

tion of the need for the permanent injunction would properly have been made only after an evidentiary hearing was had. According to the lower court, the plaintiff did not show, as is required by *Dombrowski*, that his First Amendment rights are being violated. Plaintiff alleged at some length, violations of his First Amendment rights, which allegations should have been sufficient, in the posture of the case as it was before the court when it rendered its opinion, to warrant an evidentiary hearing. To deny plaintiff an evidentiary hearing by which he could establish the need for a permanent injunction was to deny him due process of law. Daniel Webster said, in the *Dartmouth College* case, that by due process of law is meant:

> "A law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial."

The lower court abused its discretion and committed gross error when it failed to afford plaintiff an opportunity to prove the allegations of his complaint.

In his reasons for granting the temporary restraining order, Judge Heebe said, after recognizing the comity issue, the delicate balance between the Federal and state courts, but most especially after recognizing that the points of reference of these principles are in a process of continual development "along the lines sketched by Dombrowski vs. Pfister"; "The so-called 'anti-injunction statute,' 28

U.S.C. Section 2283, is based on the obvious premise that a federal court can conceivably be authorized to stay a state proceeding in the interests (in which federal courts have a paramount interest) of the protection of federal constitutional rights."

Judge Heebe further recognized the possibility of the issuance of a permanent injunction after a hearing had on the issues stated in and raised by plaintiff's complaint:

> "Given this state of the law, the real possibility of a determination in the plaintiff's favor by the three-judge court which, under the law, should be the court to determine the issue, and the irreparable harm which may accrue to the plaintiff by the initiation of his trial prior to the three-judge hearing, we think equity demands, and the proprietary interest of the federal courts authorize, whatever short delay of the state trial we now grant."

Judge Heebe recognized that plaintiff's rights could not be vindicated nor would they be protected by the state court when he said:

> "Plainly, the court considered an injunction against the state proceeding warranted simply because the criminal prosecution could not serve as an adequate vehicle for the protection of the rights which the prosecution itself had allegedly endangered. It does not seem to be essential to

the Dombrowski holding that the court continued to find specifically that the prosecution there has the effect of impairing the plaintiff's freedom of expression; other federal rights should be equally entitled to protection where a finding of irreparable injury, which cannot be safeguarded within the context of the criminal proceeding, is warranted."

"The pervasive allegations of the petitioner here that his prosecution by the defendants is totally without foundation, we think raise the definite reasonable possibility of a finding on the merits that his rights cannot be vindicated within the context of his state prosecution. It is true that the petitioner has not complained of the infringement, by this prosecution, of any specific federal constitutional right which is part and parcel of the criminal proceedings in the state court. But the petitioner certainly does complain about 'illegal, unwarranted, fraudulent, and useless' actions directed, against his person and the totality of his freedom, by agents of the State of Louisiana acting in their official capacity. The compartmentalization of the totality of a person's 'right to be let alone' by the state may be helpful generally in the development of a coherent body of law under the various civil rights amendments to the Constitution, but the trend is not always conducive to the adequate protection of individual liberty; *the Supreme Court has strongly indicated that*

the 'concept of liberty' is not to be tied down merely to the recitation of the conventional freedoms stratified in specific guarantees in the Bill of Rights where substantial unjust interference by the state with personal liberty is involved, see GRISWOLD v. CONNECTICUT, 381 U.S. 479 (1965). In short, the plaintiff's complaint raises real issues of alleged deprivations of liberty through the actions of the state, the correction of which, if proven, might well require DOMBROWSKI relief." (Emphasis added.)

Since for the purposes of the lower court's ruling, all allegations contained in the complaint must be regarded as true, and since no answer was filed to the complaint by the defendants and no offers of proof or affidavits were offered on behalf of the defendants, the lower court obviously committed gross error and abused its discretion when it dismissed plaintiff's complaint without having first afforded him an opportunity through an evidentiary hearing to prove the allegations of his complaint.

This Court recognized in *Dombrowski* that a citizen's rights cannot always be protected through adjudication of the state prosecution through state criminal procedures. Long delays in adjudication, limited state court rulings, the possibility of a review by the State Supreme Court, writs of certiorari to this Court, and writs of habeas corpus to the State Federal Courts severely punish the individual regardless of the ultimate outcome of the case. Fol-

lowing *Dombrowski,* Judge Heebe likewise recognized the inability of this plaintiff to secure protection and vidication of his rights through the state court procedures.

XIV. THE WARREN REPORT AND THE KENNEDY ASSASSINATION PROBE.

John F. Kennedy, President of the United States, was assassinated at Dallas, Texas, November 22, 1963. On November 29, 1963, President Lyndon B. Johnson signed Executive Order No. 11130 creating a commission "to ascertain, evaluate and report upon the facts relating to the assassination of the late President John F. Kennedy and the subsequent violent death of the man charged with the assassination." The Chief Justice of this Court was designated as the Commission's Chairman, and the report of that Commission has come to be known as "The Warren Report." That report concluded in part that the shots which killed President Kennedy were fired by one Lee Harvey Oswald and that no evidence was found that Oswald was involved with any person or group in a conspiracy to assassinate the President.

Jim Garrison, District Attorney for the Parish of Orleans, State of Louisiana, acting under color of authority vested in him by virtue of the public office which he holds, is conducting an investigation into the assassination of President Kennedy which is now known throughout this country and the world at large as the "Garrison Kennedy Assassination Probe."

Garrison has labeled the Warren Report "a fraud upon the American Public." Garrison, acting under color of authority vested in him as District Attorney for the City of New Orleans is conducting a reign of terror. All who oppose Garrison's theories incur his wrath and displeasure and if they are within his jurisdiction, criminal charges are filed against them in an effort to silence his crtics. Two of Garrison's victims, other than the plaintiff in this case, have sought relief from his attacks and protection of their constitutional rights through the federal court system. See the cases of *Chandler vs. Garrison, supra* and *Walter Sheridan and Richard Townley vs. Garrison,* 273 F.Supp. 673 (E.D. La. 1967). The plaintiff in this case is the third victim of Garrison's reign of terror to seek relief from his attacks and protection of his constitutional rights in the federal court system. A three-judge court in the *Chandler* case, after a full-scale evidentiary hearing, exercised its broad equity power and granted injunctive relief. Section 2283 was not considered since no criminal proceedings had as yet been instituted against Chandler. Chandler won the "race to the courthouse" and sought injunctive relief prior to the filing of charges against him, the filing of which charges was imminent. The court said:

> "The unusual and exceptional circumstances here warrant an exercise by equity powers to prevent oppression to Chandler and to further the ends of justice by protecting Chandler's basic federal constitutional rights. It is clear that

no useful public purpose is to be served by requiring plaintiff to respond to the Grand Jury subpoena. Louisiana law does not permit the presence of counsel with the witness in an appearance before the Grand Jury. The facts disclose quite clearly that the prosecutor has no faith in the truthfulness of the witness having so declared publicly and in writing.

"The special circumstances of this case demand that plaintiff's federal constitutional rights be maintained and preserved. In our view, they can only be assured by an injunction against the enforcement of the Grand Jury subpoena. The Court is, therefore, obliged to take such action as the facts require. Cf. *Dombrowski vs. Pfister, 380 U.S. 479, 85 S.Ct. 1116 (1965).*"

Chandler is a reporter for Life Magazine, resides in New Orleans, and has reported the "Garrison probe" since its inception. The *Chandler* case, however, arose out of his participation in the publication by Life Magazine of a series of articles styled "Organized Crime in Louisiana." The existence of organized crime in Garrison's jurisdiction and Garrison himself were featured quite prominently in one of these articles.

Sheridan and Townley were employed by the National Broadcasting Company to assist in NBC's preparation of an hour-long documentary report to the American people concerning defendant Garrison's

assassination probe. The program was telecast throughout the nation on June 19, 1967, and was highly critical of the probe, particularly of Garrison's bizarre methods of investigation. On July 7, 1967, Garrison filed a bill of information against Sheridan charging him with public bribery of Perry Raymond Russo in violation of LRS 14:18. On July 11, 1967, three bills of information were filed against Townley charging him with bribery of Russo, as well as another witness.

On July 18, 1967, after the bill of information charging him with public bribery had been filed against him, Sheridan was served with a subpoena to appear before the Orleans Parish Grand Jury. An effort was made to quash the subpoena in the state courts on grounds, among others, of alleged violation of Sheridan's constitutional rights. The trial court denied the motion. An applicaton to the Louisiana Supreme Court for writs of review was denied. On August 9, 1967, an effort was made to serve Sheridan with another subpoena to appear before the Grand Jury. Sheridan was not in the city and the subpoena was served on his attorney who advised the foreman of the Grand Jury that Mr. Sheridan was out of the city. On August 9, 1967, Sheridan was ordered to appear in court to show cause why he should not be held in contempt of the Grand Jury for failing to respond to the last subpoena. On August 10, Messrs. Sheridan and Townley filed their complaint in the United States District Court for the Eastern District of Louisiana seeking injunctive relief under Title 42

U.S.C., Sections 1983 and 1985 (3). The complaint alleged violation of the rights of plaintiffs guaranteed under the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Injunctive relief against enforcement of the Grand Jury processes during the pendency of the criminal charges against Sheridan, against the pending prosecutions against both defendants and against further efforts to harass, intimidate and deter plaintiffs in the exercise of their constitutionally protected rights, was sought.

The District Court granted plaintiffs' motion for summary judgment and issued a permanent injunction against enforcement of the Grand Jury subpoena during the pendency of the charges against Sheridan. All other relief sought was denied. Insofar as the pending prosecutions were concerned, the trial court concluded:

> "I conclude that Section 2283 forbids issuance of an injunction here. Even if it does not, giving utmost credence to the plaintiffs' affidavits and the circumstances surrounding the case, the necessary showing of threatened irreparable injury, clear and imminent, has not been made, and therefore the court should exercise its discretion and refuse to issue the injunction sought."

The appeal is presently pending in the Court of Appeals, Fifth Circuit, under Docket No. 25,516.

Others who have opposed Garrison have likewise incurred his wrath and have had criminal charges filed against them. Prominent among these individuals is Garrison's former chief investigator, William Gurvich. In June of 1968, Gurvich resigned from Garrison's staff and publicly labeled the Garrison Kennedy assassination probe as a fraud. In due course, Garrison charged Gurvich with theft of $19.00, as represented by his copy of the "master file" of the investigation. These charges are presently pending in the Criminal District Court for the Parish of Orleans.

In the course of his Kennedy assassination probe, Garrison has publicly stated:

"The (Warren) Report is a fraud."

"Lee Harvey Oswald killed no one in Dallas on November 22, 1963."

"The CIA presented the Warren Commission with fraudulent evidence.

"We have solved the assassination."

He has attacked "The Establishment", as he terms the Federal Govenment, by the utterance of such statements as:

"Who appointed Ramsey Clark? Who has done his best to torpedo the investigation of the case?

> Who controls the CIA? Who controls the FBI? Who controls the Archives where this evidence is locked up for so long that it is unlikely that there is anybody in this room who will be alive when it is released.? This is really our property and the property of the people of this country. Who has the arrogance and the brass to prevent the people from seeing the evidence.? Who, indeed? The one man who profited most from the assassination—your friendly President Lyndon Johnson."

In the course of events Garrison has shown his contempt for all concerned including the judiciary and the judicial processes. In his most recent contumely he had this to say about the Attorney General:

> "a political appointee who, if his father Tom Clark had not been on the Supreme Court would probably be cleaning the street with a broom."

After plaintiff was granted an injunction by the lower court pending his appeal to this Court, Garrison again attacked the Chief Justice of this Court, as well as Justice Fortas, and said that both should recuse themselves when this appeal is heard by the Court.

The charges against plaintiff are completely without merit and have no basis in fact or in law. They have been filed by Garrison, solely and only for the purpose of obtaining a judicial forum for his attacks

upon the Warren Report. In the event plaintiff is erroneously convicted in the Criminal District Court for the Parish of Orleans of having conspired with Lee Harvey Oswald, Jack Ruby and others to assassinate John F. Kennedy, as a result of the machinations of Garrison and his staff, through the misuse and abuse of the prosecutorial powers of his public office, credence will be lent to all of the frenetic critics of the Warrant Report and it will have been judicially determined to be fraudulent, incorrect, inaccurate and absolutely useless. The validity of the Warren Report is a serious and substantial question which is squarely presented by the issues of this case. It is of tremendous importance to the United States, that the Attorney General be ordered to defend the validity of the Warren Report. The trial court erred and abused its discretion when it failed to order the Attorney General of the United States to become a party to these proceedings for this purpose and when it failed to issue a judgment decreeing the validity, the accuracy and the correctness of the findings of fact and conclusion of the Warren Commission as contained in their Report to the President of the United States, pursuant to the provisions of Executive Order No. 11130.

XV. CONSTITUTIONAL SHORTCOMINGS OF LOUISIANA LAW ATTACKED AS BEING UNCONSTITUTIONAL.

The lower court upheld the validity of the Conspiracy Statute LRS 14:26. It refused to consider

the validity of any of the Louisiana procedural statutes challenged by the plaintiff.

Although it held the statute to be valid, it is obvious from a reading of the court's opinion, that it did not give serious consideration to any of the challenges asserted by plaintiff for the invalidity of the statute. The court preferred to continue its dissertation as to why the abstention doctrine was applicable, and reiterated its previous expressions of fear of doing violence to the "strong federal policy of comity", as expressed by this court in *Stefanelli v. Minard,* and *Cleary vs. Bolger, supra.* With great reluctance, the court recognized the mandate of this court in *Zwickler,* although it was of the opinion that the case could be distinguished, since there was no pending prosecution there, as there purports to be in this case; thus, again, the court is relying on Section 2283 as a bar to the declaratory relief herein sought.

In upholding the validity of LRS 14:26, the lower court actually gave no reasons for its decision. It did state that the statute properly defines a crime when it says:

> "A crime is that conduct which is defined as criminal in the Code, or in other acts of the legislature, or in the Constitution of this state."

The attack upon the statute, based on a violation of First Amendment rights, was brushed aside and con-

sidered to be rather meaningless. Quite obviously, the court was only concerned with principles of comity, and not with the issues presented to it for adjudication.

In refusing to consider the challenge of the various procedural statutes, the lower court again failed and refused to recognize the mandate of this court in *Zwickler*. This was a serious abuse of its discretion and serious error, since, as has been shown herein, should plaintfif be required to stand trial in the state court, under the provisions of Article 782 of the Louisiana Code of Criminal Procedure, the trial would be conducted before a jury of twelve persons, only nine of whom must concur to reach a verdict. As has been shown herein, this court ruled many years ago, that such a procedure constitutes a denial of due process of law. *Maxwell vs. Dow, supra.* This court reiterated these principles in the very recent case of *Duncan vs. State of Louisiana,* and in *Bloom vs. Illinois, supra.*

LRS 14:26 is very seriously challenged as being in contravention of plaintiff's rights under the First Amendment. Co-existence of this statute and the First Amendment is impossible, as the statute in question permits conviction for expression of intentions and no further action, encouragement, condonation, or contribution by the person in question. That the intentions expressed by an individual, are not good or popular intentions is of no moment, for as this court said in discussing the function of free-

dom of speech in *Turminiello vs. City of Chicago,* 337 U.S. 1, 69 S.Ct. 894 (1948):

> "It may indeed serve its highest purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. See also Dubois Clubs vs. Clark, 389 U.S. 316."

Such a statute which permits of conviction for expression of intention, even in the absence of activity, approval of activity, encouragement or condonation of activity by others, and even in the face of an uncommunicated change of intention, clashes with the very valuable and well-protected guarantee of freedom of speech and expression as provided for by the First Amendment. *Carmichael vs. Allen,* 267 F.Supp. 985 (1967), and *Ashton vs. Kentucky,* 384 U.S. 195, 86 S.Ct. 1407.

That the statute is written in very broad, sweeping terms and lacking in certainty and definiteness, as required by law, is best evinced by its definition of conspiracy:

> "The agreement or combination of two or more persons for the specific purpose of committing *any* crime." (Emphasis added.)

It is noted that there is no legislative specification as to whether reference is had, only to those crimes defined as such under Louisiana statutes, or wheth-

er the statute encompasses acts denounced as criminal by the legislatures of other states, or the Congress of the United States. Left unanswered by the statute, is the further question of whether or not a person who conspires in Louisiana to commit a crime in another state, is guilty of a violation of the Louisiana statute, and punishable by the courts of Louisiana. The vague, indefinite, and indecisive nature of the statute runs afoul of the guarantee of due process since the citizen is entitled to be informed of, and need not speculate, as to what the state commands or forbids. *Lanzetta vs. State of New Jersey*, 306 U.S. 451, 59 S.Ct. 618, *Bouie vs. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, *Baggett vs. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316.

Article 7, Section 41 of the Louisiana Constitution and Article 402 of the Code of Criminal Procedure contain identical provisions to the effect that no woman shall be drawn or selected for jury service unless she has previously volunteered to serve. Under the provisions of Articles 409, 410, 412, 413 and 416 of the Code of Criminal Procedure, both grand and petit jurors are drawn from a known source of the general venire box. A similar Florida statute was upheld by this court in *Hoyt vs. Florida*, 368 U.S. 57, 82 S.Ct. 159, and *Fay vs. New York*, 332 U.S. 289, 67 S.Ct. 1628. The decisions are now obsolete if the theory adopted by the Fifth Circuit in *Labat vs. Bennett*, 365 F.2d 698, is correct. The Fifth Circuit in the *Labat* case held in unequivocal language, that the exclusion of a large segment of the community

in having a jury composed of a "cross-section of the community", is totally incompatible. In referring to the exclusion of a class of persons referred to as "daily wage earners", the court said:

> ". . . .but this segment of the community is so large and so important that a jury system without daily wage earners simply is not representative of the community."
>
> "The overriding consideration in establishing a jury is not the burden of jury service on prospective jurors, but the fairness of the systems. . . ."

Can there be any doubt that women as a class or segment of the community, "is so large and so important that a jury system without daily wage earners simply is not representative of the community. . . ."

Again, Article 7, Section 41 of the Louisiana Constitution, and Article 782 of the Code of Criminal Procedure both provide:

> ". . .cases in which punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict."

Under the penalty provisions of LRS 14:26, the crime with which plaintiff is charged, is punishable by imprisonment at hard labor for not less than one, nor

more than twenty years. This has been defined by this court as a serious crime. *Duncan vs. Louisiana, supra.*

In *Duncan vs. Louisiana*, this court reversed earlier decisions to the effect that the jury trial provisions of the Sixth Amendment were not basic fundamental rights binding upon the states by virtue of the Fourteenth Amendment, when it said:

> "Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right to a jury trial in all cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee. Since we consider the appeal before us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused."

> "Our conclusion is that in the American states, as in the federal judicial system, a general grant of jury trial for serious offenses, is a fundamental right essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."

See also the case of *Andres vs. U.S.*, 333 U.S. 740, 68 S.Ct. 880, in which the court held that the jury must unanimously agree on both guilt or innocence, and the severity of the penalty. In the case of *American Publishing Company vs. Fisher, et al.*, 166

U.S. 464, 17 S.Ct. 618, this court held that a unanimous verdict was required, and that the nine juror concurrence statute of the state of Utah was null and void, under the provisions of the Seventh Amendment to the Constitution, saying that "unanimity was one of the peculiar and essential features of trial by jury at the common law".

Under the provisions of Articles 484 and 485 of the Louisiana Code of Criminal Procedure, an accused is entitled to have furnished to him ". . .particulars setting up more particularly and more specifically the nature of the charge against the defendant". No procedure for discovery is provided for in the Louisiana Code of Criminal Procedure. Particulars are sought by means of motions therefor. The continued refusal and failure of the public prosecutor, confirmed and upheld by the trial court, to divulge the precise time and place and the nature of all of the acts allegedly committed by plaintiff in furtherance of the alleged conspiracy, the continued suppression of documents, statements and other material required by the accused for his defense, violates the letter and the spirit of due process of law under the Fourteenth Amendment and is a deprivation of due process of law, as has been held by this court in *Dennis vs. U.S.*, 384 U.S. 855, 86 S.Ct. 1840 (1966), *Jancks vs. U.S.*, 353 U.S. 657, *Giles vs. Maryland*, 386 U.S. 66 (1967), *Brady vs. Maryland*, 373 U.S. 83 (1963). See also "The Right to Discovery in a Criminal Case" by William H. Erickson. In sustaining the objection of the District Attorney to the

production of this information, the state court has relied on *State of Louisiana vs. Hunter*, 195 So.2d 273 (1967). In so ruling, the trial court has again refused to recognize the applicability of the supremacy clause of the United States Constitution, which prohibits the application of state laws where there is a clear conflict of that law with the federal law, all in violation of plaintiff's constitutional rights, and in particular, his right to the equal protection of law. *Matt vs. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961).

It is known that Garrison has evidence favorable to the plaintiff. The suppression of such evidence is violative of due process. *Miller vs. Pate*, 87 USC 167. These articles of the Louisiana Code of Criminal Procedure are repugnant to, and violative of, the First, Fourth, Fifth, Sixth and Fourteenth Amendments.

Under the provisions of Articles 433 and 434, proceedings had before the Orleans Parish Grand Jury are secret and an accused cannot obtain for the purposes of cross-examination or any other purpose, a transcript of any of the proceedings conducted before that body which resulted in his indictment. Plaintiff avers that these Articles of the Code are repugnant to, and violative of, the First, Fifth, Sixth and Fourteenth Amendments to the Constitution. This court's landmark decisions in *Miranda vs. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), and its forerunner *Escobedo vs. Illinois*, 378 U.S. 478, 84 S. Ct. 1758 (1964) brought wholly new dimensions to the

Fifth Amendment privilege against self-incrimination, as well as the Sixth Amendment rights to counsel in a criminal case. In *Malloy vs. Hogan,* 378 U.S. 1, 84 S.Ct. 1489 (1964), the court held that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the states". These procedural provisions of the Louisiana Code further prohibit the right of a citizen to counsel when subpoenaed to appear before the Grand Jury, and are void and repugnant to the aforesaid provisions of the Constitution, for that reason as well. Admittedly, this court has not, as of this date, nullified the provisions of such statutes which are to be found in the criminal codes of many of the states. It is submitted, however, that if the court is to follow its reasoning in *Escobedo* and *Miranda,* as well as *Malloy,* said provisions are obviously null and void as being repugnant to, and violative of, the fundamental rights of the citizen.

It is submitted that these are very serious and substantial questions which should be considered by this court, or in the alternative, remanded to the lower court with instructions to decide the constitutionality, or lack of constitutionality of these provisions of the Louisiana statutes which materially affect the basic fundamental rights of this citizen.

XVI. THE ATTORNEY GENERAL OF THE UNITED STATES IS A PROPER PARTY TO THESE PROCEEDINGS.

Subsequent to the filing of the complaint, plaintiff filed a motion to have the Attorney General of the United States made a party to these proceedings, asserting that the validity of the Warren Report was at stake, and that the Attorney General, and not the plaintiff herein, should defend the Report. Represented by the U. S. Attorney for the Eastern District of Louisiana, the motion was successfully opposed. The court's jurisdiction was invoked under 28 USC Section 1361 and 1391 (e), 28 USC Section 509, and 547.

The bar of 28 USC 2283 does not apply to the United States when it is seeking to enjoin an action in a state court. *Leiter Minerals vs. United States,* 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957). Therefore plaintiff would not have been confronted with the problem of Section 2283, if this motion had been granted, or in the alternative, if the U. S. Attorney General had seen fit to perform his duties by intervening in the case, having been repeatedly requested to do so. Unquestionably, the lower court would have conducted an evidentiary hearing. It is not unusual for the Attorney General to intervene in civil rights cases. In recent years, he has done so on many occasions.

There can be no doubt that the United States is "concerned" in the context of Section 547 with the

validity of the Warren Report which involves the most heinous crime of the century, the assassination of one of the most beloved presidents of this country, John F. Kennedy. Section 547 can be interpreted to impose and absolute duty upon the Attorney General acting through his assistant U. S. Attorneys, to concern himself in cases involving the integrity of the Chief Executive Officer of this country, the Chief Justice of this Court, outstanding and respected members of Congress, and intrinsically important federal agencies, such as the U. S. Department of Justice, the Federal Bureau of Investigation, the Central Intelligence Agency, and others. There can be no doubt but that if it is not concerned with this case, that it should be so concerned. By virtue of this prosecution, this unethical and unscrupulous public prosecutor, Garrison, seeks to prove to the world at large:

1) That the President of the United States was and is an accessory after the fact in the murder of his predecessor, John F. Kennedy.

2) To brand Executive Order No. 11130 issued by President Johnson, as a farce, an order issued in bad faith, and as part of a scheme to deceive and mislead the citizens of this country.

3) To impugn the honesty and integrity of the Chief Justice of this Court, the Attorney General of the United States, those members of Congress who served on the Warren Commission, the Chief and members of the Federal Bureau of Investigation, the Secret Service and the Central Intelligence Agency.

To say that the United States is not concerned with these proceedings, is to say that it places no value on the faith and confidence of the American people in the government of this country. That it is not concerned with the fact that the President of the United States has been accused of criminal activity, and that the entire governmental structure of this country is completely devoid of honesty, integrity, frankness, and good faith toward the citizenry.

It is to be noted that Garrison opposed the motion to join the Attorney General in these proceedings. This is but another example of the serious bad faith prosecution without hope of obtaining a valid conviction with which the plaintiff is faced. For some nineteen months past, Garrison has told the country and the world at large that the President of the United States, the Justice Department, the Central Intelligence Agency, the Secret Service, and the Federal Bureau of Investigation, are all seriously involved in this prosecution. All such individuals, and all such agencies have remained mute, as a result of which there is no doubt but that a large segment of the public accepts the Garrison credo as fact. Were Garrison acting in good faith, he was here afforded an opportunity by the plaintiff, through these proceedings, to prove in a court of law, the very serious charges which he has literally hurled at these very responsible individuals and agencies at his every whim and fancy.

It is submitted that contrary to the opinion of the lower court, the federal judiciary does have the right to cause the Attorney General to be made a party to these proceedings.

XVII. THE THREE-JUDGE DISTRICT COURT ABUSED ITS DISCRETION.

Plaintiff recognizes the general principle that the action of the three-judge court in denying injunctive relief, will not be disturbed on appeal in the absence of a showing of abuse of discretion. However, it is submitted that this case involves abuse of discretion of a clear and unmistakable nature. In support of this, plaintiff invites the court's attention to the following circumstances:

1) The constitutionally protected rights of freedom of expression, the right to a fair trial in an atmosphere of judicial calm and serenity, and one devoid of prejudice and violence, the right to trial by jury, all of whom must concur in order to reach a verdict, the right to due process of law through a hearing of the evidence available to prove the allegations of a complaint, the right to a fair trial, and the other federal rights referred to in the complaint and at issue herein, are all matters which this court has repeatedly held to be fundamental rights guaranteed and protected by the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. By refusing to exercise its equity power the lower court has denied these fundamental rights to plaintiff.

2) The court below refused to grant plaintiff an evidentiary hearing to prove the allegations of his complaint, thus denying him due process of law as provided for by the Fourteenth Amendment. This despite the fact that no responsive pleadings denying the allegations of the complaint, were filed on behalf of the defendants, and no affidavits or other offers of proof were filed in support of defendants' motion to dismiss, which was treated by the lower court as a motion for a summary judgment.

3) In upholding the constitutionality of the Louisiana Conspiracy Statute, LRS 14:26, and in disregarding and refusing to consider the provisions of Article 782 of the Louisiana Code of Criminal Procedure, the court ignored this court's decision in *Duncan vs. Louisiana, supra* and *Maxwell vs. Dow, supra*, to the effect that due process requires and demands that one accused of a serious crime is entitled to a trial by jury of twelve of his peers, all of whom must concur to reach a verdict.

4) The lower court failed and refused to grant injunctive relief for the protection of plaintiff's fundamental personal rights, despite the mandate of this court in its recent decision in *Dombrowski vs. Pfister, supra*, to the effect that injunctive relief is proper under exceptional circumstances, such as those shown and presented by this case.

5) The lower court erred and abused its discretion in interpreting this court's decision in *Dom-*

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browski, and the relief therein provided for, to be restricted to situations where the citizen's First Amendment rights of freedom of expression and freedom of speech are violated.

6) The lower court abused its discretion and erred in refusing to allow the plaintiff the relief provided for by this Court's decision in *Dombrowski*, despite the fact that plaintiff alleged numerous violations of his First Amendment rights, as well as numerous violations of other federally-guaranteed rights.

7) The lower court abused its discretion and erred when it held that the Federal Injunction Statute, 28 USC 2283, bars injunctive relief in the exceptional circumstances and facts presented by this case, and that the Civil Rights Act, Title 42, Section 1983, is not an exception to that bar. In so doing, the court relied on principles of federalism, the effect of which principles, has been altered and varied and exceptions thereto created by this court's decision in *Dombrowski vs. Pfister, supra.*

8) The lower court erred in holding that the proceedings pending in the state court constituted "A pending state court criminal proceeding", and hence injunctive relief was barred by Title 28, Section 2283, although the trial of said proceedings has not commenced.

9) The lower court erred and abused its discretion in refusing to grant plaintiff an evidentiary hearing on his complaint, despite the fact that one member of the court found that there was probable grounds for the issuance of a permanent injunction, by the issuance of a temporary restraining order without the necessity of a hearing on the request therefor.

10) The exceptional circumstances pleaded on behalf of plaintiff, uncontroverted and not denied, establish that plaintiff is being prosecuted "in serious bad faith", without hope of obtaining a valid conviction for the crime of conspiring to murder John F. Kennedy, late President of the United States, a crime established by the Warren Report as having been committed by one Lee Harvey Oswald, acting alone and not in concert or conspiracy with any other person or persons, or group of persons, and hence the lower court abused its discretion when it failed and refused to grant plaintiff injunctive relief against prosecution for that crime.

11) The exceptional circumstances pleaded on behalf of plaintiff, uncontroverted and not denied, establish beyond a peradventure of a doubt, that plaintiff is being prosecuted "in serious bad faith", without hope of obtaining a valid conviction, hence the lower court abused its discretion and erred when it held and found that plaintiff's constitutional rights

could be vindicated and would be protected in the state court.

12) The lower court erred and abused its discretion when it failed to recognize that the exceptional circumstances presented by this case, uncontroverted and not denied, show and establish that the "chilling effect" and "the threat of irreparable injury" required by traditional doctrines of equity, was made out, so as to entitle plaintiff to injunctive relief.

13) The lower court abused its discretion and erred when it failed and refused to recognize the tremendous importance of the Warren Report to this country and all of its citizens and failed and refused to issue a decree that said report is valid, accurate and correct, binding upon, and admissible in evidence in all courts of the United States.

14) The lower court abused its discretion when it refused to recognize the tremendous importance of this case and the exceptional circumstances herein pleaded, its tremendous importance to the public at large, when it refused to order the Attorney General of the United States to be made a party to these proceedings.

15) The lower court abused its discretion when it failed to consider the numerous decisions of this court for the protection of the citizen's guaranteed fundamental rights, wherein it is held that a crim-

inal trial is not a game, is not a sporting event, and that an accused is entitled to have full particulars of the crime allegedly committed by him, so as to enable him to assist his counsel in the preparation of his defense.

16) The reasons given by the court below in its opinion denying the injunctive relief herein sought, show a complete lack of understanding by said court of the recent decisions of this court for the protection of federally guaranteed constitutional rights of all citizens as exemplified by *Dombrowski vs. Pfister, supra, Duncan vs. Louisiana, supra, Bloom vs. Illinois, supra, Sheppard vs. Maxwell, supra, Estes vs. the State of Texas,* and others.

Under these circumstances, the action of the court below in denying the injunctive relief sought, was an arbitrary and unjust denial of the relief to which the plaintiff is entitled, and involves a serious abuse of discretion, which this court should correct.

It is submitted that the lower court abused its discretion and committed gross error in dismissing plaintiff's complaint and in failing to grant him the injunctive relief which he seeks and requires for the protection of his fundamental, constitutionally guaranteed federal rights; that it committed further serious error and abuse of its discretion in dismissing the complaint without a hearing. We submit and believe that the questions presented by this appeal

are of tremendous public importance, and that they are serious and substantial.

Respectfully submitted,

.....

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.....

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Attorneys at Law.

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared

EDWARD F. WEGMANN,

who being by me first duly sworn, did depose and state:

That he is a practicing attorney, a member of the Bar of the State of Louisiana, as well as that of the United States District Court for the Eastern District of Louisiana, and the Circuit Court of Appeals, Fifth Circuit; that on September 26, 1968, he served a copy of the attached jurisdictional statement filed with the Supreme Court of the United States, on the several parties to these proceedings, as follows:

1. On the United States by mailing a copy in a duly addressed envelope, with first-class postage prepaid, to the Honorable Louis C. LaCour, United States Attorney for the Eastern District of Louisiana, 500 St. Louis Street, New Orleans, Louisiana 70130; and by mailing a copy in a duly addressed envelope, with air-mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530.

2. On Jim Garrison, James L. Alcock and Charles R. Ward, defendants, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to 2700 Tulane Avenue, New Orleans, Louisiana 70119.

3. On Numa V. Bertel, Jr., attorney of record for the defendants Jim Garrison, James L. Alcock and Charles R. Ward, by mailing a copy in a duly addressed envelope, with first-class postage prepaid, to 2700 Tulane Avenue, New Orleans, Louisiana 70119.

EDWARD F. WEGMANN,
(Edward F. Wegmann),
Attorney for Clay L. Shaw,
Plaintiff,
1047 National Bank of Commerce Building,
New Orleans, Louisiana 70112.

SWORN TO AND SUBSCRIBED BEFORE ME, NOTARY, THIS 26th DAY OF SEPTEMBER, 1968.

FRED P. WESTENBERGER,
(Fred P. Westenberger),
Notary Public, Parish of Orleans, State of Louisiana.

My commission expires at death.

(SEAL)

APPENDIX A.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION No. 68-1063, SECTION B

CLAY L. SHAW

versus

JIM GARRISON individually, and as District Attorney for the Parish of Orleans, State of Louisiana, and JAMES L. ALCOCK, individually and as Executive Assistant District Attorney for the Parish of Orleans, State of Louisiana, and CHARLES R. WARD, individually, and as an Assistant District Attorney for the Parish of Orleans, State of Louisiana.

TEMPORARY RESTRAINING ORDER.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to 28 U.S.C. § 2284(3), that the Defendants Jim Garrison, James L. Alcock, and Charles R. Ward, and each of them and their respective assistants, associates, attorneys, employees, agents, officers and assigns be, and they are hereby, ENJOINED AND RESTRAINED from taking any further action in the prosecution of the case entitled "State of Louisiana v. Clay L. Shaw," Number 198-059 on the Docket of the Criminal District Court for the Parish of Orleans, State of Louisiana, pending the further orders of this Court.

REASONS.

The complaint herein (a 47-page document of 116 paragraphs) presents allegations of numerous deprivations of the petitioner's federal rights by the defendant District Attorneys within the context of, or connected with, the criminal prosecution pending against him in the state court for conspiracy to murder the late President Kennedy. The complaint read as a whole presents much more than a recitation of isolated wrongs, but impugns the entire prosecution against the petitioner and attempts to raise the actions of the defendants, prior to and during the present criminal proceedings, to the level of a concerted pattern of persecution of the petitioner and the wholesale and willful disregard of the petitioner's constitutional rights. The complaint states that "the petitioner requires a 'sanctuary' in this Court to grant him relief from the irreparable harm, clear and imminent, which he has suffered at the hands of the defendants herein since March 1, 1967," (Count 4 of the Complaint), during which time, "the defendants * * * have * * * conducted themselves and their office in such a manner as to create an atmosphere of fear and suspicion concerning the motives and actions of the Office of the District Attorney for the Parish of Orleans" (Count 88); that "the defendants, and in particular, Defendant Garrison, are conducting a reign of terror by the misuse and abuse of the powers of the public offices which they hold, by conducting an illegal, unwarranted, fraudulent and useless probe of the as-

sassination of the late John F. Kennedy," (Count 96), that "the erstwhile Kennedy assassination probe being conducted by the defendants is indistinguishable from the case" against the petitioner (Count 97), and that "although plaintiff has been the primary victim of the machinations of the defendants through the abuse and misuse of the power of their respectve offices, many others have felt the impact of their reign of terror, and the case of State vs. Shaw is now and has for sometime past been of tremendous public importance, not only to the citizens of this community, but to all citizens of the United States and to the world." (Count 98).

The thrust of these allegations raises serious questions concerning the relationship between this federal district court and the Louisiana Criminal District Court in which the prosecution against the plaintiff is lodged, and indeed between federal and state courts across the nation. Whenever a federal court stays the hand of a state official, the delicate balance of comity, so necessary and wholesome for our federal system, is likely to be disturbed. The delicacy of the comity issue is not only greatly increased, but augmented by the now-entrenched principles of equity law, see *Ex parte Young*, 209 U.S. 123, 161-162 (1908), when the state agency involved is a court of law and the state official an esteemed member of the state judiciary. But as delicate as the comity balance must be, the points of reference on which it rests today are in a process of continual development, along lines sketched by

Dombrowski v. Pfister, 380 U.S. 479 (1964). At this stage in the development of the law and the possible future developments indicated by the Supreme Court, we are not prepared to rule out the possibility of a remedy for this plaintiff under the state of facts he presents in his petition. And because there is a very real likelihood that the plaintiff may prevail on the merits, and because in view of the plaintiff's allegations of the unconstitutionality of various pertinent Louisiana statutes a three-judge court is required in this matter in the interest of the State of Louisiana, see Wright on Federal Courts § 50, p. 162, and it may not be possible for the hearing before that court to be held and concluded prior to the scheduled date of the trial of the plaintiff in the state court to the possible irreparable injury of the plaintiff, we grant the motion for temporary restraining order pending a speedy hearing on the motion for preliminary injunction.

The so-called "anti-injunction statute," 28 U.S.C. §2283, is based on the obvious premise that a federal court can conceivably be authorized to stay a state proceeding in the interests (in which federal courts have a paramount interest) of the protection of federal constitutional rights.[1] The question whether § 2283 can be accepted a step further to either (a) not prohibit the stay of a state criminal prose-

[1] This would follow, *inter alia*, not only from the fact that Congress saw a need to bolster equity considerations, cf. *Ex parte Young, supra*, with this general prohibition, but also from the recognized power of the federal Congress to provide for exclusive jurisdiction of federal constitutional matters in the federal courts, cf. Wright on Federal Courts, § 10, p. 22.

cution along the lines of *Dombrowski*, or (b) authorize such a stay, is not something which can easily be resolved in the light of comments in *Dombrowski* and the more recent case of *Cameron v. Johnson*, 36 U.S.L.Week 4319 (April 23, 1968). In *Dombrowski*, the court found it "unnecessary to resolve the question whether suits under 42 U.S.C. § 1983 (1958 ed.) come under the 'expressly authorized' exception to § 2283." 380 U.S. at 484 n.2.[2] In *Cameron* the court upheld the denial of injunctive relief against state prosecutions by the district court, and noted

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[2] Of course, aside from the question of what constitutes an "express authorization" within the terms of § 2283 and the question of whether or not 42 U.S.C. § 1983 is such an express authorization, there seems to be a serious question whether any express authorization is necessary in view of the equitable origins of § 2283. The leading case on the subject, apart from the sparse comments by the Supreme Court in *Dombrowski* and *Cameron*, is *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964). There, the court noted that: "Since the statute [§ 2283] was fathered by the principles of comity, it has been held that the statute should be read in the light of those principles and, though absolute in its terms, is inapplicable in extraordinary cases in which an injunction against state court proceedings is the only means of avoiding grave and irreparable injury." 337 F.2d at 593. The *Baines* case preceded the Supreme Court's decision in *Dombrowski*, and the Fourth Circuit therefore had no occasion to consider whether its holding that § 2283 "is not always absolute" might be coterminous with the authority of the federal courts to enjoin prospective state criminal proceedings recognized in *Dombrowski*. Of particular importance to our decision here, the court in *Baines* stated: "Recognizing that the command of § 2283 is not always absolute, we granted a temporary injunction pending appeal of this case. * * * Such an injunction was essential if the controversies were not to become moot while these appeals were being perfected, heard, and determined in this court. We concluded that it was such an extraordinary situation that issuance of a temporary injunction staying prosecutions in the state courts pending our disposition of this appeal was authorized notwithstanding § 2283." 337 F.2d at 593-594.

"Our per curiam [which had previously remanded the case for reconsideration] stated, 381 U.S. 741-742: 'On remand, the district court should first consider whether 28 U.S.C. § 2283 bars a federal injunction in this case, see 380 U.S. at 484, n.2. If § 2283 is not a bar, the court should then determine whether relief is proper in light of the criteria set forth in *Dombrowski*.' The district court held that § 2283 prohibited the court from enjoining or abating the criminal prosecutions initiated against the appellants prior to the filing of the suit on April 13, 1964, and further, that 42 U.S.C. § 1983 creates no exception to § 2283. 262 F.Supp. 873, 878. We find it unnecessary to resolve either question and intimate no view whatever upon the correctness of the holding of the district court." 36 U.S.L. Week 4320, n.3.

Given this state of the law, the real possibility of a determination in the plaintiff's favor by the three-judge court which, under the law, should be the court to determine the issue, and the irreparable harm which may accrue to the plaintiff by the initiation of his trial prior to the three-judge hearing, we think equity demands, and the proprietary interest of the federal courts authorize, whatever short delay of the state trial we now grant.

Nor do we think, apart from the issues posed by § 2283 and *Ex parte Young, supra, Dombrowski v. Pfister* precludes the possibility that the plaintiff

may prevail. *Dombrowski*, in fact, has greatly enlarged the possibility of federal injunction of state criminal prosecutions. The case does contain much language which seems to limit the possibility to cases where First Amendment rights are endangered. Nonetheless, a too narrow interpretation of *Dombrowski*, attempting to limit its thrust solely to cases where First Amendment rights are jeopardized, would dilute the major and fundamental premise of the decision. In *Dombrowski*, the court referred to cases declining to enjoin state prosecutions as follows:

> "In such cases it 'does not appear that the plaintiffs have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, nor that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursuant to this court.' *Douglas v. City of Jeanette* [319 U.S. 157] at 164. But the allegations in this complaint depict a situation in which defense of the state's criminal prosecution will not insure adequate vindication of constitutional rights." 380 U.S. at 485.

Plainly, the court considered an injunction against the state proceeding warranted simply because the criminal prosecution could not serve as an adequate vehicle for the protection of the rights

which the prosecution itself had allegedly endangered. It does not seem to be essential to the *Dombrowski* holding that the court continued to find specifically that the prosecution there has the effect of impairing the plaintiffs' freedom of expression; other federal rights should be equally entitled to protection where a finding of irreparable injury, which cannot be safeguarded within the context of the criminal proceeding, is warranted.

The pervasive allegations of the petitioner here that his prosecution by the defendants is totally without foundation, we think raise the definite reasonable possibility of a finding on the merits that his rights cannot be vindicated within the context of his state prosecution. It is true that the petitioner has not complained of the infringement, by this prosecution, of any specific federal constitutional right which is not part and parcel of the criminal proceedings in the state court.[3] But the petitioner certainly does complain about "illegal, unwarranted, fraudulent, and useless" actions directed, against his person and the totality of his freedom, by agents of the State of Louisiana acting in their official capacity. The compartmentalization of the totality of a person's "right to be let alone" by the state may be helpful generally in the development of a coherent body of law under the various civil rights

[3] It is, of course, at the heart of the *Dombrowski* finding of "irreparable injury" sufficient to justify an injunction against a state proceeding, that the plaintiffs be "threatened with [some substantial] injury other than that incidental to every criminal proceeding brought lawfully and in good faith." 380 U.S. at 485.

amendments to the Constitution, but the trend is not always conducive to the adequate protection of individual liberty; the Supreme Court has strongly indicated that the "concept of liberty" is not to be tied down merely to the recitation of the conventional freedoms stratified in specific guarantees in the Bill of Rights where substantial unjust interference by the state with personal liberty is involved, see *Griswold v. Connecticut*, 381 U.S. 479 (1965). In short the plaintiff's complaint raises real issues of alleged deprivations of liberty through the actions of the state, the correction of which, if proven, might well require *Dombrowski* relief.

FREDERICK J. R. HEEBE,
UNITED STATES DISTRICT
JUDGE

New Orleans, Louisiana.

May 28, 1968 at 2:10 P.M.

APPENDIX B.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION No. 68-1063, SECTION B

CLAY L. SHAW
vs.
JIM GARRISON, individually, et al.

BEFORE: AINSWORTH, Circuit Judge, and HEEBE and COMISKEY, District Judges.

PER CURIAM:

The plaintiff Clay L. Shaw is under indictment in the Criminal District Court for the Parish of Orleans, Louisiana, for having "wilfully and unlawfully conspire[d]. . .to murder John F. Kennedy." He has filed this suit against Jim Garrison, District Attorney for the Parish of Orleans, and two of his assistants for declaratory and injunctive relief in an effort to arrest the prosecution. He was initially charged on March 1, 1967 by the defendant Garrison with participating in a conspiracy to murder President Kennedy. Thereafter on March 14, 1967 a preliminary hearing was held in the State court before a three judge panel to determine whether there was sufficient evidence to establish probable cause to charge Shaw with conspiracy.

The State offered four witnesses, one of whom, Perry Raymond Russo, testified that he was present when the plaintiff and Lee Harvey Oswald and David William Ferrie conspired to kill the Presi-

dent. Another witness, Vernon Bundy, stated that he saw plaintiff having a conversation with Oswald near Lake Pontchartrain in New Orleans. The three-judge panel ruled that sufficient evidence had been presented to establish probable cause that a crime had been committed and to justify continuing the prosecution against the plaintiff. On March 22, 1967, plaintiff was indicted for conspiracy to murder John F. Kennedy by the Orleans Parish Grand Jury. On August 1, 1967, the defendants moved to select a trial date, but on September 27, 1967, plaintiff asked for a continuance, or a change of venue. A hearing was held on the motion and upon the suggestion of the defendants Garrison and Alcock, the court granted a continuance until February, 1968. On February 19, 1968, citing the great publicity the case had received, the plaintiff moved the Criminal District Court to order a change of venue. An extensive evidentiary hearing was conducted by the trial judge after which the motion was denied on April 4. The Supreme Court of the State of Louisiana denied plaintiff's application for writs of certiorari on the question of venue on April 23, 1968. The trial was then set for June 11, 1968.

Now, on May 27, 1968, nearly 15 months after the plaintiff was originally charged, he filed this suit asking for an injunction against the prosecution for which trial was set on June 11, 1968. A temporary restraining order against taking any further action in the prosecution was issued by one member of our panel on May 28, 1968, after which this three-judge court was constituted to hear the case.

Plaintiff's complaint contains numerous allegations of constitutional infirmities in the State prosecution against him. He contends that the preliminary hearing was illegal because it was heard before a three-judge state court, which was not authorized by the Louisiana statutes concerning preliminary hearings; that the defendants made a search of plaintiff's premises and confiscated much of his property under the authority of an illegally issued search warrant; that the indictment was returned on insufficient evidence; that he is prejudiced by the considerable publicity which this case has received; and that the state court has unjustly denied his application and supplemental application for a bill of particulars. He asks that this court declare as unconstitutional Articles 402,[1] 403,[2] 409,[3] and 413[4]

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[1] "Art. 402. *Service of women as jurors*

A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service."

[2] "Art. 403. *Exemption from jury service*

The following persons are exempt from jury service, but the exemption is personal to them and is not a ground for challenge:

(1) The governor, lieutenant governor, state comptroller, state treasurer, secretary of state, superintendent of public education, their clerks and employees, the members, officers, and clerks of the legislature, and the judges and active officers of the several courts of this state;

(2) Any other public official, if jury service would seriously interfere with the performance of his official duties;

(3) Attorneys-at-law, peace officers, ministers of the gospel, physicians and dentists actively engaged in the practice of their professions, school teachers, school bus drivers, pharmacists, members of paid fire departments, and persons who are required to travel regularly and routinely in the course and scope of their employment;

(4) Persons who because of age, sickness, or other physical infirmity would suffer serious detriment if required to serve as a juror; and

of the Louisiana Code of Criminal Procedure and Article VII, Section 41 of the Louisiana Constitution of 1921,[5] which provisions deal with the qualifications

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(5) Persons who have served as grand or petit jurors in criminal cases or as trial jurors in civil cases during a period of twelve months immediately preceding their selection for jury service."

[3] "Art. 409. *Selection of general venire in Orleans parish*

"In the Parish of Orleans, the jury commission shall select impartially at least seven hundred fifty persons having the qualifications to serve as jurors, who shall constitute the general venire.

A list of the persons so selected shall be prepared and certified by the commission as the general venire list and shall be kept as part of the records of the commission.

The name and address of each person on the list shall be written on a separate slip of paper which shall be placed in a box labeled 'General Venire Box.'

No drawing shall be made from a general venire containing fewer than seven hundred fifty names, except when the court orders the drawing of tales jurors.

After the jury commission has selected the general venire, it shall lock and seal the general venire box and deliver it to the secretary of the commission, as the custodian thereof."

[4] "Art. 413. *Method of impaneling of grand jury; selection of foreman*

The grand jury shall consist of twelve persons qualified to serve as jurors, selected or drawn from the grand jury venire.

In parishes other than Orleans, the court shall select one person from the grand jury venire to serve as foreman of the grand jury. The sheriff shall draw indiscriminately and by lot from the envelope containing the remaining names on the grand jury venire a sufficient number of names to complete the grand jury. The envelope containing the remaining names shall be replaced into the grand jury box for use in filling vacancies as provided in Article 415.

In the Parish of Orleans, the court shall select twelve persons from the grand jury venire, who shall constitute the grand jury. The court shall thereupon select one of the jurors to serve as foreman."

[5] "Art. 7 §41. *Selection of jurors; women jurors; trial by judge; trial by jury*

The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall

and manner of selection of jurors. He also attacks the constitutionality of Articles 433[6] and 434[7] of the Louisiana Code of Criminal Procedure, which arti-

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be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

[6] "Art. 433. *Persons present during grand jury sessions*

A. Only the following persons may be present at the sessions of the grand jury:

(1) The district attorney and assistant district attorneys, or any one or more of them;

(2) The witness under examination;

(3) A person sworn to record the proceedings of, and the testimony given before, the grand jury; and

(4) An interpreter sworn to translate the testimony of a witness who is unable to speak the English language.

B. No person, other than a grand juror, shall be present while the grand jury is deliberating and voting.

C. A person who is intentionally present at a meeting of the grand jury, except as authorized by Paragraph A of this article, shall be in constructive contempt of court."

[7] "Art. 434. *Secrecy of grand jury meetings*

Members of the grand jury, all other persons present at a grand jury meeting, and all persons having confidential access to information concerning grand jury proceedings, shall keep secret the testimony of witnesses and all other matters occurring at, or directly connected with, a meeting of the grand jury. However, after the indictment, such persons may reveal statutory irregularities in grand jury proceedings to defense counsel, the district attorney, or the court, and may testify concerning them. Such persons may disclose testimony given before the grand jury, at any time when permitted by the court, to show that a witness committed perjury in his testimony before the grand jury. A witness may discuss his testimony given before the grand jury with counsel for a person under investigation or indicted, with the district attorney, or with the court.

Any person who violates the provisions of this article shall be in constructive contempt of court."

cles deal with grand jury proceedings. He further contends that Articles 484[8] and 485[9] of the Louisiana Code of Criminal Procedure are unconstitutional; these provisions are concerned with bills of particulars. He also asks that Articles 627[10] and 912[11] of

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[8] "Art. 484. *Bill of particulars.*

A motion for a bill of particulars may be filed of right before trial or within ten days after arraignment, whichever is earlier. After expiration of the ten-day period the court may permit the filing of such a motion until the commencement of trial. When a motion is filed, or on its own motion, the court may require the district attorney to furnish a bill of particulars setting up more specifically the nature and cause of the charge against the defendant.

Supplemental bills of particulars or a new bill may be ordered by the court at any time before the trial begins.

When a bill of particulars is furnished, it shall be filed of record and a copy of the bill given to the defendant."

[9] "Art. 485. *Effect of inconsistent or limiting allegations of bill of particulars.*

If it appears from the bill of particulars furnished under Article 484, together with any particulars appearing in the indictment, that the offense charged in the indictment was not committed, or that the defendant did not commit it, or that there is a ground for quashing the indictment, the court may on its own motion, and on motion of the defendant shall, order that the indictment be quashed unless the defect is cured. The defect will be cured if the district attorney furnishes, within a period fixed by the court and not to exceed three days from the order, another bill of particulars which either by itself or together with any particulars appearing in the indictment so states the particular as to make it appear that the offense charged was committed by the defendant, or that there is no ground for quashing the indictment, as the case may be."

[10] "Art. 627. *Appeals*

If a change of venue is granted to the defendant over the objection of the state, or if the court denies an application by the state for a change of venue, the state shall have the right to appeal from the ruling, within the legal delays for making a motion for an appeal before a trial on the merits. Prior to sentence the defendant may not appeal from a ruling changing or refusing to change the venue."

[11] "Art. 912. *Judgments or rulings appealable*

A. Only a final judgment or ruling is appealable.

B. The state cannot appeal from a verdict of acquittal. Adverse judgments or rulings from which the state may

the same code, which deny the defendant the right to appeal from the denial of a motion for change of venue, be declared unconstitutional. He then shifts his constitutional assault to the Louisiana Criminal Code and asserts that LSA-R.S. 14:26,[12] Lou-

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appeal include, but are not limited to, judgments or rulings on:

(1) A motion to quash an indictment or any count thereof;

(2) A plea of time limitation;

(3) A plea of double jeopardy;

(4) A motion in arrest of judgment;

(5) A motion to change the venue;

(6) A motion to recuse; and

(7) An order in an extradition proceeding.

C. The judgments or rulings from which the defendant may appeal include, but are not limited to:

(1) A judgment which imposes sentence;

(2) A ruling upon a motion by the state declaring the present insanity of the defendant; and

(3) A ruling ordering the defendant to be extradited."

[12] "R.S. 14:26. *Criminal conspiracy.*

Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime; provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination.

Where the intended basic crime has been consummated the conspirators may be tried for either the conspiracy or the completed offense, and a conviction for one shall not bar a prosecution for the other.

Whoever is a party to a criminal conspiracy to commit a crime punishable by death or life imprisonment, shall be imprisoned at hard labor for not less than one nor more than twenty years.

Whoever is a party to a criminal conspiracy to commit the crimes of theft or of receiving stolen things shall be fined not more than two hundred dollars, or imprisoned for not more than one year, or both.

Whoever is a party to a criminal conspiracy to commit any other crime shall be fined or imprisoned, or both, in the same manner as for the offense contemplated by the conspirators; but such fine or imprisonment shall not exceed one-half of the largest fine, or one-half the longest term of imprisonment prescribed for such offense, or both."

isiana's conspiracy statute (under which plaintiff was indicted), is unconstitutional because of vagueness, in that it is written in broad, general and indefinite language and the penalties for the crime are not certain. He also contends that 14:26 is void because it does not define the word "crime" as contained in the statute or designate what crimes the statute has reference to when it states that a conspiracy to commit crime is a criminal offense. In a memorandum filed in opposition to a motion to dismiss subsequently brought by the defendants, plaintiff also attacks the conspiracy statute as being violative of the First Amendment right of freedom of speech. Plaintiff alleges that he is suffering irreparable injury because of the pending criminal prosecution and prays that it be enjoined. In an amendment to his complaint plaintiff further alleges that defendants are not prosecuting him in good faith but "have charged him solely and only for the purpose of using him as a vehicle to the forum which they sought for their attacks on the Warren Report." Plaintiffs also claim that the defendants "are not motivated by an expectation of securing a valid conviction," but their actions are part of a plan to harass plaintiff from asserting his rights to free speech and assembly and to "harass any and all individual citizens who disagree with their theories as to the assassination of President Kennedy, how the assassination came about, who participated in the assassination, the political consequences of the death of the President, and the integrity of the members of the Warren Commission."

In the amended complaint plaintiff also adds Article 782[13] of the Louisiana Code of Criminal Procedure to the list of provisions which he claims are unconstitutional. This article states, *inter alia*, that cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict.

Plaintiff has also requested that we grant a declaratory judgment decreeing that the report of the Warren Commission to the President of the United States, pursuant to Executive Order No. 11130, is valid, accurate and correct, binding and controlling upon all courts of the United States, and admissible in evidence in the state court prosecution. In addition, plaintiff prays that we grant a mandatory injunction against the defendants compelling them to furnish to plaintiff certain documents relative to the prosecution.

I.

After the suit was filed, plaintiff filed a motion to join the Attorney General of the United States under

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[13] "Art. 782. *Number of jurors composing jury; number which must concur*

Cases in which the punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict. Cases in which the punishment may be imprisonment at hard labor, shall be tried by a jury composed of five jurors, all of whom must concur to render a verdict. Except as provided in Article 780, trial by jury may not be waived."

Rule 19 of the Federal Rules of Civil Procedure[14] as a defendant or an involuntary plaintiff, and the court's jurisdiction was invoked under 28 U.S.C.

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[14] "Rule 19.

(a) *Persons to be Joined if Feasible.*

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder not Feasible.*

If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoinder.*

A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of Class Actions.*

This rule is subject to the provisions of Rule 23. As amended Feb. 28, 1966, eff. July 1, 1966."

§1361[15] which grants to federal district courts original jurisdiction of any action in the nature of mandamus to compel an officer of the United States or any agency thereof to perform a duty owed to the plaintiff, and §1391(e),[16] relating to venue requirements for civil actions in which officers of the United States, or any agency thereof are defendants. Plaintiff argues that 28 U.S.C. §509[17] vests all functions of officers of the Department of Justice in the Attorney General. He then cites 28 U.S.C. §547, which provides:

"Except as otherwise provided by law, each United States attorney, within his district, shall

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15 "28 U.S.C. §1361. *Action to compel an officer of the United States to perform his duty*

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

16 "28 U.S.C. §1391(e) *Venue generally*

"(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.'

17 "28 U.S.C. §509. *Functions of the Attorney General*

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General. . . ."

> . . .(2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned:. . ."

The Court has strong reservations as to whether, by virtue of §509, the Attorney General, rather than the United States Attorney for the Eastern District of Louisiana, may be joined. But it is not necessary that we dispose of that question, as we are of the opinion that neither the Attorney General nor the United States Attorney may be joined in this case under §547.

Under §547 the plaintiff argues that it is a proceeding with which the United States is concerned. Plaintiff argues that this is such a case because of the defendants' attempts to discredit the Report of the Warren Commission and several officers and agencies of the United States Government and their alleged effort to destroy the confidence of the American people in the government of the United States. Plaintiff also reiterates that the validity of the Warren Report is an issue in this case since he has asked for a declaratory judgment as to its accuracy.

The United States Attorney for the Eastern District of Louisiana has informed the Court that the Attorney General objects to being made a party to this suit. In pleadings which were subsequently filed by the United States Attorney it is suggested that the Court lacks jurisdiction over the Attorney General;

that the venue is improper; that 28 U.S.C. §1361 and Rule 19 of the Federal Rules of Civil Procedure are inapplicable to this case; and that there is no justifiable case or controversy as far as the Attorney General is concerned. It is unnecessary that we consider these questions further because of our belief that we cannot interfere with the Attorney General's decision which would constitute an infringement by us upon the discretion of the executive branch of the United States government. The Attorney General's absolute discretion in deciding whether or not to prosecute criminal cases was confirmed by the Fifth Circuit Court of Appeals in *Smith v. United States*, 375 F.2d 243 (5th Cir., 1967). In our opinion, the Attorney General and the executive branch of the government have the same discretion in deciding whether the United States is concerned in particular civil action. In *Newman v. United States*, 382 F.2d 479, 482 (D.C.Cir., 1967), a case involving the duties of the United States Attorney, the Court of Appeals for the District of Columbia said:

> "It is assumed that the United States Attorney will perform his duties and exercise his powers consistent with his oaths; and while this discretion is subject to abuse or misuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors.
>
> "The remedy lies ultimately within the establishment where power and discretion reside. The

> President has abundant supervisory and disciplinary powers—including summary dismissal—to deal with misconduct of his subordinates; it is not the function of the judiciary to review the exercise of executive discretion whether it be that of the President himself or those to whom he has delegated certain of his powers."

We agree with this statement and accordingly deny the plaintiff's motion to compel the Attorney General to be made a party to this action.

II.

The defendants filed a motion to dismiss the plaintiff's action for failure to state a claim upon which relief can be granted. Since Documents outside the pleadings, namely, exhibits and a complete transcript of the state preliminary hearing, are being considered, we treat this as a motion for a summary judgment.

The defendants argue that this suit should be dismissed because 28 U.S.C. §2283[18] prohibits a federal court from enjoining pending state court proceedings. On the other hand, the plaintiff contends that §2283 should not apply because of the exceptional circumstances he has alleged.

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[18] "28 U.S.C. §2283. *Stay of State court proceedings*

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

In deciding whether the circumstances alleged by plaintiff entitle him to the injunctive relief, it is first necessary to consider some of the more important cases dealing with the question of when federal courts may enjoin state court criminal prosecutions. In *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S. Ct. 877, 87 L.Ed. 1324 (1943), plaintiffs, Jehovah's Witnesses, brought a suit in the federal district court to restrain threatened criminal prosecution of them in the state courts by the city and its mayor for violation of a city ordinance prohibiting the solicitation of orders for merchandise without first procuring a license from the city authorities and paying a license tax. Plaintiffs were distributing religious pamphlets without obtaining a license and were threatened with prosecution under this ordinance unless they procured licenses. They alleged that the ordinance was an unconstitutional abridgement of free speech, press and religion in violation of the First Amendment. Although in *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 63 S. Ct. 870, 87 L.Ed. 1292 (1943), decided on the same day as *Douglas*, the Supreme Court declared the same ordinance unconstitutional, it refused to hold in the *Douglas* case that an injunction should issue against any threatened state prosecutions. The Court stated that federal courts should refuse "to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent injury which is clear and imminent. . ." 319 U.S. at 163, 63 S.Ct. at 881. The Court went on to

say, "No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance may be determined as readily in the criminal case as in a suit for an injunction." *Ibid.* The Court found that the declared intention to institute prosecutions against plaintiffs was not sufficient to establish irreparable injury in the circumstances of that case.

In *Stefanelli v. Minard*, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951), the Supreme Court held that a federal injunction should not issue against using allegedly illegally seized evidence in a state criminal trial and gave this clear statement of the considerations governing the federal policy against enjoining state prosecutions:

> "The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum with review if need be to this Court, to deter-

> mine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution." 342 U.S. at 123, 72 S.Ct. at 121-122.

This language was quoted with approval by the Supreme Court in *Cleary v. Bolger*, 371 U.S. 392, 83 S.Ct. 385, 9 L.Ed.2d 390 (1963), in which the Court held that it was improper to enjoin a state official from presenting certain evidence in a state court criminal prosecution. The court said, "The withholding of injunctive relief against this state official does not deprive respondent of the opportunity for federal correction of any denial of federal constitutional rights in the state proceedings. To the extent that such rights have been violated, cf., e.g., Mapp v. Ohio, supra, he may raise the objection in the state courts and then seek review in this Court of an adverse determination by the New York Court of Appeals. To permit such claims to be litigated collaterally, as is sought here, would in effect frustrate the deep-seated federal policy against piecemeal review." 371 U.S. at 400-401, 83 S.Ct. at 390.

The principles formulated by the jurisprudence through *Cleary v. Bolger* may be briefly summarized at this point. According to these cases the mere fact that the plaintiff was claiming that his constitutional rights were being violated was not a ground for such an injunction. In addition to such a claim, a plaintiff must show that he would suffer irreparable injury which is clear and imminent. Only such a showing would create the exceptional case or special circumstances in which an injunction should issue. The question of what would constitute irreparable injury had never been answered. Under these cases it is apparent that the danger of a conviction, standing alone, did not constitute irreparable injury because constitutional infirmities in the trial could be reviewed in the various remedies thereafter available to the defendant, such as appeal to the Louisiana Supreme Court, writ of certiorari to the United States Supreme Court, and writs of habeas corpus to state and federal courts.

Then came *Dombrowski v. Pfister,* 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), in which the Supreme Court found one of the exceptional cases or special circumstances alluded to in the *Douglas* case. The plaintiffs, the Southern Conference Educational Fund, Inc. (SCEF), two of its officers, and an attorney for SCEF, filed suit in a United States District Court, requesting an injunction against imminent prosecutions and threats of such prosecution under the Louisiana Communist Propaganda Control Law and the Louisiana Subversive Activities

and Communist Control Law. The complaint alleged that the statutes were unconstitutionally vague and that defendants—the Governor, police and law enforcement officers, and the Chairman of the Legislative Joint Committee on Un-American Activities in Louisiana—had threatened prosecutions in bad faith solely for the prupose of discouraging civil rights activities. The plaintiffs claimed that the threats to enforce these statutes against them were made without any expectation of securing valid convictions, but rather were part of a plan to harass and discourage them and their supporters from asserting the constitutional rights of Negro citizens of Louisiana. Past events convinced the Court that the plaintiffs' freedom of expression had been subjected to a chilling effect. In October, 1963, the two officers of SCEF and SCEF's attorney were arrested by Louisiana state and local police and charged with violations of the two statutes. Their offices were raided and their records and files were seized. Later in October a state judge quashed the arrest warrants as not based on probable cause and discharged the plaintiffs. Subsequently, the state court granted a motion to suppress the seized evidence on the ground that the raid was illegal. Louisiana officials continued, however, to threaten prosecution of the plaintiffs, who thereupon filed suit in a federal district court. A three-judge court was constituted to hear the case. Shortly after the court was convened, a grand jury was summoned in the Parish of Orleans to hear evidence looking to indictments of the plaintiffs. At this

point one of the members of the three-judge court issued a temporary restraining order against any further prosecutions, but subsequently a majority of the court dismissed the complaint and dissolved the temporary restraining order. Thereafter the grand jury returned indictments under the Louisiana Subversive Activities and Communist Control Law against the plaintiffs. The Supreme Court was concerned over the adverse effect which these events had upon the operations of SCEF:

> "These events, together with repeated announcements by appellee that the appellant organization is a subversive or Communist-front organization, whose members must register or be prosecuted under the Louisiana statutes, have, appellants allege, frightened off potential members and contributors. . . Seizures of documents and records have paralyzed operations and threatened exposure of the identity of adherents to a locally unpopular cause. . . Although the particular seizure has been quashed in the state courts, the continuing threat of prosecution portends further arrests and seizures, some of which may be upheld and all of which will cause the organization inconvenience or worse. . . .Not only does the complaint allege far more than an 'injury other than that incidental to every criminal prosecution brought lawfully and in good faith, but appellants allege threats to enforce statutory provisions other than those under which indict-

ments which have been brought. Since there is no immediate prospect of a final state adjudication as to those other sections—if, indeed, there is any certainty that prosecution of the pending indictments will resolve all constitutional issues presented—a series of state criminal prosecutions will not provide satisfactory resolution of constitutional issues." 380 U. S. at 488-489, 85 S.Ct. at 1122.

In these exceptional circumstances the Court held that a case of "the threat of irreparable injury required by traditional doctrines of equity" was made out, 380 U. S. at 490, 85 S.Ct. at 1123, and it ruled that "the district Court erred in holding that the complaint fails to allege sufficient irreparable injury to justify equitable relief." 380 U. S. at 489, 85 S.Ct. at 1122. The Court held further that certain sections of the Louisiana Subversive Activities and Communist Control Law were patently unconstitutional on their face and remanded with direction to frame an appropriate injunction restraining prosecution of the indictments obtained under this law.

The most recent Supreme Court case in this area is *Cameron v. Johnson,* 88 S.Ct. 1335, ... U.S. .... (1968). The plaintiffs brought an action for declaratory and injunctive relief in the United States District Court. They sought a declaratory judgment decreeing that the Mississippi Anti-Picketing Law was void on its face as an overly broad and vague regulation of expression. They also sought a perma-

nent injunction restraining the defendants—the governor and other Mississippi officials—from enforcing the statute in pending or future criminal prosecutions. They alleged that the pending prosecutions against them for violating the statute were part of a plan of selective enforcement engaged in by defendants with no expectation of securing convictions, but solely to discourage plaintiffs from picketing to protest racial discrimination in voter registration and from encouraging Negro citizens to attempt to register to vote. At the time of the suit there were numerous criminal prosecutions pending against plaintiffs. But the Supreme Court held that the circumstances of this case were not controlled by *Dombrowski* and upheld the district court's refusal to grant the injunction. Here, unlike *Dombrowski*, the state statute was held to be a valid law. Furthermore, the Court found that the Mississippi officials had not enforced it against the plaintiffs in bad faith to harass their exercise of protected expression and without any intention of pressing the charges or any expectation of obtaining convictions. Rather, the Court held that the officials had in good faith regarded the plaintiffs' conduct as violating the statute.

We now summarize the effect of *Dombrowski* and *Cameron* on the earlier jurisprudence. In *Dombrowski* the Court carved out one of the special circumstances or exceptional cases under which a federal injunction may issue, when it held that under the peculiar circumstances of that case there was an exception to the general policy against federal injunc-

tions of state court proceedings. This may be called the "chilling effect" exception, because the irreparable injury in this case was the chilling effect on the First Amendment rights of the plaintiffs in the *Dombrowski* case, which was caused by the defendant's threat of repeated raids on SCEF's headquarters and arrest and prosecution of SCEF's officials. But the fact that a constitutional right has allegedly been infringed, standing alone, is not enough to come within the chilling effect doctrine. For the Court in the *Dombrowski* case said, "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial appplication of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." 380 U.S. 479, 484-485, 85 S.Ct. 1116, 1120. Rather, in order to come within this exception the plaintiff must show that the prosecution has been brought against him, not because the defendants in good faith believe that he has violated Louisiana's conspiracy statute, but in bad faith, knowing that he did not commit the crime of conspiracy, in order to harass the plaintiff in the exercise of his First Amendment rights without any expectation of obtaining a valid conviction. It is not enough for the plaintiff to allege that he is innocent of state charges in order to obtain injunctive relief. As the Supreme Court said in *Cameron v. Johnson, supra*, 88 S.Ct. at 1341:

> "[T]he question for the District Court was not the guilt or innocence of the persons

charged, the question was whether the statute was enforced against them with no expectation of convictions but only to discourage exercise of protected rights. The mere possibility of erroneous application of the statute does not amount 'to the irreparable injury necessary to justify a disruption of orderly state proceedings.' Dombrowski v. Pfister, supra, 380 U.S. at 485, 85 S.Ct. at 1120. The issue of guilt or innocence is for the state court at the criminal trial; the State was not required to prove appellants guilty in the federal proceedings to escape the finding that the State had no expectation of securing valid convictions."

Turning now to the case before us, there can be no question that the plaintiff has alleged that he is the victim of a prosecution conducted in bad faith. In his complaint he alleges that the defendants "have not acted in good faith, but to the contrary, they have charged plaintiff and caused him to be indicted solely and only for the purpose of using him as a vehicle to the forum which they sought for their attacks on the Warren Report. He is a 'patsy' or a 'pawn' in the hands of the defendants, being used by them in furtherance of their false and fraudulent investigation of the Kennedy assassination." Surely, it cannot be doubted that these allegations if proved, would establish that the plaintiff is being prosecuted in bad faith. If the plaintiff's contentions are true, the defendants' conduct in this case would constitute serious bad faith.

But under *Dombrowski* and *Cameron* the plaintiff, in order to obtain injunctive relief must also show that his First Amendment rights are being violated. In *Cameron v. Johnson, supra,* Justice Fortas dissented and thought that the prosecutions should have been enjoined. Nevertheless, he did not contend that an injunction should issue under *Dombrowski* in the absence of First Amendment violations, but on the contrary, said, "*Dombrowski's* remedy is justified *only* when First Amendment rights, which are basic to our freedom, are imperiled by calculated, deliberate state assault." 88 S.Ct. 1335, 1338. (Emphasis added.) The plaintiff does allege that his First Amendment rights are being infringed in the following manner: he has been prohibited from leaving the jurisdiction; he has been under surveillance by the defendants and their agents; he has received threats to his life; his business and social activities, his attendance at public functions, and his appearances in public life generally have been restricted; his neighbors and friends have been subjected to interrogation, surveillance, and harassment; the defendant Garrison has made public and private statements that the plaintiff would either commit suicide or be killed prior to trial; the plaintiff fears arrest and/or entrapment; the defendant Garrison has made repeated public and private statements that there is no way that the plaintiff can be acquitted; the telephone of plaintiff and his associates has been tapped; there has been electronic intrusion into plaintiff's home; there has been repeated public speculation, as well as statements by the defendants and others, about

his private life, conduct and habits; the plaintiff has been held up to ridicule by the defendants and the public at large because of the groundless charge brought against him; he has been made the subject of undue and extensive surveillance and investigation of his private life by parties unknown to him, as a result of which he alleges that his right of freedom of expression, thoughts and actions has been obliterated; he fears for his safety and has to accept police protection when making court appearances; he is unable to obtain gainful employment; his attorneys have been subjected to publicized vitriolic attacks by defendants; and the plaintiff fears to occupy his homestead.

Some of the matters alleged, such as the prohibition from leaving the jurisdiction and the restriction of plaintiff's business and social activities, are merely part of the "injury incidental to every proceeding brought lawfully and in good faith," *Cameron v. Johnson, supra,* 88 S.Ct. at 1339. However, even though all of these allegations, if proved, would show that the plaintiff has suffered injury and injustice because of the prosecution, a plaintiff seeking Dombrowski relief must also show that the bad faith prosecution has been brought for the purpose of continuing harassment in order to discourage him in the exercise of his First Amendment rights. Here the plaintiff contends that the defendants' "actions are part of a plan to employ illegal searches and seizures and threats of prosecution under color of the statute to harass plaintiff, and to discourage others of his class,

from asserting his rights to free speech and assembly, as guaranteed to him by the First Amendment to the Constitution of the United States." Plaintiff discusses his claim in more detail when he refers to "defendants' plan to employ arrests, seizures and threats of prosecution, under color of various Louisiana statutes, including but not limited to LRS 14:26, to harass any and all individual citizens who disagree with their theories as to the assassination of President Kennedy, how the assassination came about, who participated in the assassination, the political consequences of the death of the President, the integrity of the investigating officers, and the integrity of the members of the Warren Commission." There is no suggestion by plaintiff that the prosecution has the effect of continuous harassment in the exercise by him of protected expression in the *Dombrowski* context. His right of such expression has not been impaired. During the oral hearing on this motion, counsel for plaintiff informed the Court that the plaintiff has never publicly taken a stand either for or against the Warren Report, nor has he made any public statements about his theories on the assassination of President Kennedy. It is clear that the prosecution was not instituted for the purpose of discouraging the plaintiff in the exercise of his First Amendment rights. Accordingly, we hold that plaintiff has failed to bring his case within the ambit of the *Dombrowski* decision.

Plaintiff also alleges that the defendants "are not motivated by any expectation of obtaining a valid

conviction . . ." But in several parts of his complaint plaintiff indicates that he fears that he may be convicted. In Paragraph 41 he states that should he be convicted, he will suffer irreparable injury from the publicity which will attend such a conviction. In Paragraph 51 of his complaint he states that he "will have his liberty placed in jeopardy by standing trial" in the state court. In Paragraph 58 he states that he will suffer irreparable injury "in the event of his conviction . . ." And in Paragraph 59 he notes the possibility of being incarcerated without bail pending appeal from a conviction. All of the actions which the defendants have taken, since they obtained a ruling at the close of the preliminary hearing that there was probable cause to justify continuing the prosecution against the plaintiff, indicate that they are striving for a conviction. It should be noted in this respect that this case had been set for trial by the defendants on June 11, 1968, before a temporary restraining order was granted against further prosecution of this case.

Nor do we believe that the plaintiff's alleged injury is irreparable. An acquittal in the state court would end the alleged injury. And our holding that an injunction shall not issue does not preclude the plaintiff from ultimate federal review of the state court proceedings and relief from any unjust consequences which he may suffer during such proceedings. Review of the plaintiff's trial may be obtained by appeal to the Louisiana Supreme Court, writ of certiorari to the United States Supreme Court, and

by writs of habeas corpus to the state and federal courts. Furthermore, the plaintiff may well be acquitted at the trial.

In *City of Greenwood v. Peacock*, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966), the Supreme Court held that a state criminal prosecution could not be removed from state court to federal court, even though the defendants claimed that "they are being prosecuted on baseless charges solely because of their race . . ." The Court was of the opinion that if these allegations were true, "there has been an outrageous denial of their federal rights," but added that "the federal courts are far from powerless to redress the wrongs done to them." 384 U.S. at 828, 86 S.Ct. at 1813. The Supreme Court said that "there are many other remedies available in the federal courts to redress the wrongs claimed by the individual petitioners in the extraordinary circumstances they alleged in their removal petition." 584 U.S. at 829, 86 S.Ct. at 1813. The Court further said:

> "If they go to trial and there is a complete absence of evidence against them, their convictions will be set aside because of a denial of due process of law. Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654. If at their trial they are in fact denied any federal constitutional rights, and these denials go uncorrected by other courts of the State, the remedy of federal habeas corpus is freely available to them. Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed. 837. If

their federal claims at trial have been denied through an unfair or deficient fact-finding process, that, too, can be corrected by a federal court. Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770.

"Other sanctions, civil and criminal, are available in the federal courts against officers of a State who violate the petitioners' federal constitutional and statutory rights. Under 42 U.S.C. § 1983 (1964 ed.) the officers may be made to respond in damages not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492." 384 U.S. at 829-830, 86 S.Ct. at 1813-1814.

We believe that the Supreme Court's reasoning concerning removal in the *Peacock* case is equally applicable here and that plaintiff will have ample opportunity to obtain ultimate federal relief from any injuries he may suffer as a result of the possible deprivation of his constitutional rights in the state court prosecution, should he fail to achieve vindication of his rights in the state court proceedings.[19]

Summary judgment is appropriate here without an evidentiary hearing because the pleadings and ex-

[19] Plaintiff's counsel in brief p. 42 erroneously states that the present case has been removed from the state court and therefore there are no presently pending state proceedings which would bar an injunction under §2283. This is probably an inadvertance by counsel since it is quite clear there has been no removal of the state proceedings to the federal court.

hibits adequately set forth the details and facts of plaintiff's case. Counsel for plaintiff has followed the Louisiana practice of articulating all of the facts in his verified pleadings, as is required by Article 854 of the Louisiana Code of Civil Procedure,[20] and therefore, we are apprised of the nature of plaintiff's case in ultimate detail. The complaint as amended consists of 58 pages and 125 allegations. We have been informed by counsel for plaintiff that they would use every witness in this case that they would call in the state court trial. We have accepted all well pleaded facts as true, but we have nevertheless concluded that plaintiff is not entitled to injunctive relief under *Dombrowski* and *Cameron*.

Plaintiff also contends that 28 U.S.C. §2283 does not bar injunctive releief which he seeks under 42 U.S.C. §1983.[21] He argues that §1983 is an exception to the provisions of §2283 which forbids a United States Court to grant an injunction to stay state court proceedings "except as expressly authorized by Act of Congress . . ." But we need not pass on this ques-

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[20] "Art. 854. *Form of pleading*

No technical forms of pleading are required.

All allegations of fact of the petition, exceptions, or answer shall be simple, concise, and direct, and shall be set forth in numbered paragraphs. As far as practicable, the contents of each paragraph shall be limited to a single set of circumstances."

[21] "42 U.S.C. §1983 *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. §1979."

tion in view of our holding above that the injury that plaintiff has alleged is not irreparable. The Supreme Court has not yet found it necessary to pass on this matter.[22] But it is apparent from an examination of some of the cases dealing with the question of federal injunctions of state court prosecutions that even if we found that §1983 is an expressly authorized exception to §2283, we should not grant injunctive relief in the absence of exceptional circumstances showing irreparable injury without which federal courts have been reluctant to enjoin state court prosecutions. One writer has commented that the question of whether §1983 is an exception to §2283 is "largely academic" because even "where the anti-injunction statute does not apply, federal courts have been reluctant to interfere in state matters in the area of civil rights except in extraordinary circumstances."[23]

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[22] See *Dombrowski v. Pfister, supra,* at 380 U.S. 484, 85 S.Ct. 119-120, footnote 2, and *Cameron v. Johnson, supra,* at 88 S.Ct. 1337, footnote 3. But there are several federal cases in which this point has been considered. The Third Circuit held that §1983 does constitute an exception to §2283 in *Cooper v. Hutchinson,* 184 F.2d 119 (3rd Cir., 1950), and this case was followed by a district court in the same circuit in *Tribune Review Publishing Company v. Thomas,* 153 F.Supp. 486 W.D. Pa., 1957). Cases in which it was held that §1983 does not constitute an exception to §2283 are *Baines v. City of Danville,* 337 F.2d 579 (4th Cir., 1964); cert. den. *Chase v. McClain,* 381 U.S. 939, 85 S.Ct. 1772, 14 L.Ed.2d 702 (1965); *Smith v. Village of Lansing,* 241 F.2d 856 (7th Cir., 1957); *Goss v. State of Illinois,* 312 F.2d 257 (7th Cir., 1963); *Sexton v. Barry,* 233 F.2d 220 (6th Cir., 1956), cert. den. 352 U.S. 870, 77 S.Ct. 94, 1 L.Ed.2d (1956); *Brooks v. Briley,* 274 F.Supp. 538 (M.D.Tenn., 1967), aff'd, 88 S.Ct. 1671 (1968); *Sheridan v. Garrison,* 273 F.Supp. 673 (E.D.La., 1967); and *Cameron v. Johnson,* 262 F.Supp. 873 (S.D.Miss., 1966), aff'd on other grounds, 88 S.Ct. 1335 (1968).

[23] Note, Incompatibility—The Touchstone of Section 2283's Express Authorization Exception, 50 Va. L.Rev. 1404, 1427-1428 (1964).

In this context it should be pointed out that in *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943), the Supreme Court held that the plaintiffs had successfully invoked jurisdiction under the predecessor statutory provision to §1983. Nevertheless, it refused to grant an injunction in the absence of extraordinary circumstances. In *Stefanelli v. Minard*, 342 U.S. 117, 230, 72 S.Ct. 118, 120, 96 L.Ed. 138 (1951), the Supreme Court warned that:

> ". . . even if the power to grant the relief here sought may fairly and constitutionally be derived from the generality of language of the Civil Rights Act [which question the Court refrained from deciding], to sustain the claim would disregard the power of courts of equity to exercise discretion when, in a matter of equity jurisdiction, the balance is against the wisdom of using their power. Here the considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the crminal law for the prosecution of crimes solely within the power of the States."

In *Cooper v. Hutchinson*, 184 F.2d 119 (3rd Cir., 1950) the Third Circuit Court of Appeals would not grant injunctive relief in spite of the fact that they held that §1983 is an expressly authorized exception to §2283. In denying injunctive relief it said:

"Nevertheless, this is a suit in equity. The giving of the peculiarly characteristic remedies available in equity lie in a chancellor's discretion, subject, of course, to review. We think a chancellor's discretion in this case requires a withholding of his arm from interfering at a preliminary stage in state litigation, at least until it has become apparent that state procedure cannot avert irreparable harm to these appellants. The Supreme Court has warned us constantly about interfering in the delicate matter of the balance between state and national authority. The 'arrest by the federal courts of the processes of the criminal law within the states * * * [is] to be supported only on a showing of danger of irreparable injury 'both great and immediate.' Douglas v. City of Jeannette . . ." 184 F.2d at 124.

Therefore we have concluded that it is unnecessary to make a definitive finding on the difficult legal question as to whether §1983 is an exception to §2283 under the circumstances here presented.

IV.

Plaintiff also seeks a declaratory judgment decreeing that LSA-R.S. 14:26, the Louisiana conspiracy statute under which he is being prosecuted, is unconstitutional. He also seeks a declaration of the unconstitutionality of the following Louisiana provisions: Articles 402, 403, 409, and 413 of the Louisiana Code

of Criminal Procedure, and Article VII, Section 41, of the Louisiana Constitution of 1921, which provisions are concerned with qualifications and manner of selection of jurors; Articles 433 and 434 of the Code of Criminal Procedure, concerning grand jury proceedings; Articles 484 and 485 of the Code of Criminal Procedure, dealing with bills of particulars; Articles 627 and 912 of the same Code, which deny a defendant the right to appeal from the denial of a motion for change of venue; and Article 782 of the Code of Criminal Procedure, which provides that cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict.[24] Of the preceding provisions being challenged here, only three, namely, Articles 402 and 409 of the Code of Criminal Procedure, and Article VII, Section 41, of the Louisiana Constitution of 1921, were challenged in the state court proceedings. It is a curious circumstance that the constitutionality of the conspiracy statute under which the plaintiff was indicted and is being prosecuted has not been questioned by the plaintiff in the state court. Therefore, it is before us for initial consideration of its constitutionality.

Plaintiff relies principally upon the decision of *Zwickler v. Koota*, 389 U. S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967), in asserting that he is entitled to independent consideration of this portion of the complaint, regardless of our determination as to the merits of his request for injunctive relief.

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[24] The full text of these provisions is set forth in Notes 1-13, supra.

Zwickler v. Koota involved the abstention doctrine, under which a federal court may abstain from determining the constitutionality of a state statute when that provision is subject to an interpretation by a court of that state which would cure it of any alleged infirmities and thereby erase the constitutional challenge.[25] In the *Zwickler* case a New York statute made it a crime to distribute in quantity certain types of political handbills for another person without printing on the handbills the name and address of the person for whom the handbills were being distributed. The plaintiff had been prosecuted under this statute, but his conviction was reversed in the state court on state law grounds. Subsequently, even though no state prosecution was pending and none was actually threatened (the plaintiff assumed, without offering any evidence to that effect, that the defendant intended to prosecute him if he distributed anonymous handbills in the future),[26] plaintiff brought suit in fed-

[25] The doctrine of abstention was first promulgated by the Supreme Court in *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941). In that case the Court stated that if a federal district court passes on the constitutionality of a statute which is subject to a construction by a state court which would remove the alleged constitutional infirmities, "no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination." 312 U. S. at 499, 61 S. Ct. at 645.

[26] In *Zwickler v. Koota*, 261 F. Supp. 985, 988 (E. D. N. Y., 1966), the three-judge district court stated that the plaintiff "presumes to read Mr. Koota's mind by alleging that Mr. Koota 'pursuant to his duties intends or will again prosecute the plaintiff for his [intended] acts of distribution' of anonymous political literature. He regards this presumption as 'the threat of prosecution' which places him 'in fear of exercising his right to make distribution as aforesaid' and which places him 'in fear of again being prosecuted therefor.'"

eral court seeking a declaratory judgment that the statute was unconstitutional on its face as an infringement upon free expression, and an injunction prohibiting future prosecution of the plaintiff under that statute. Plaintiff contended that the statute was void because of "overbreadth" in that its sweep embraced anonymous handbills both within and outside the protection of the First Amendment. But a three-judge federal district court applied the doctrine of abstention and dismissed the suit. The Supreme Court reversed and held that the doctrine of abstention could not properly be invoked. The district court had thought that this statute was susceptible to a construction by the state courts which would avoid the constitutional question. But the Supreme Court found that such a construction was impossible in this case; saying, "Appellee does not contest appellant's suggestion that §781-b [the New York statute in question] is both clear and precise; indeed, appellee concedes that state court construction cannot narrow its allegedly indiscriminate cast and render unnecessary a decision of appellant's constitutional challenge." 88 S. Ct. 391, 396-397. The Court then stated the general rule applicable to the doctrine of abstention:

> "'* * *Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. * * *' " *Id.* at 397.

The district court also thought that the special circumstances necessary for an injunction to issue under the holding in *Douglas v. City of Jeannette*, 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324 (1943), should be present if the declaratory judgment was to be rendered. But the Supreme Court held that this, too, was error and said that "a Federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." *Id.* at 391.

However, despite the language of *Zwickler*, we entertain serious doubts about the appropriateness of stopping a pending state court prosecution to consider a request of plaintiff for a declaratory judgment as to the constitutionality of R.S. 14:26, the conspiracy statute under which he is being prosecuted. Although *Zwickler* stated that the doctrine of abstention could not be invoked in the circumstances of that case, it did not nullify the well-settled rule that the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, is discretionary, rather than mandatory, and declaratory relief may be withheld by the district court in its discretion in appropriate cases.[27] This principle was stated by the Supreme

[27] See *Malone v. Emmet*, 278 F. Supp. 193, 200 (M. D. Ala., 1967), in which the court declined to grant a declaratory judgment as to the constitutionality of a state criminal procedure statute, even though declaratory relief was coupled with a request for an injunction of a pending prosecution and *Zwickler* had been decided by the Supreme Court three weeks previously. The court relied upon the discretionary nature of declaratory relief in coming to its decision.

Court in *Public Affairs Associates, Inc. v. Rickover*, 369 U. S. 111, 112, 82 S. Ct. 580, 582, 7 L. Ed. 2d 604 (1962).

> "The Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so. [citing cases] Of course a District Court cannot decline to entertain such an action as a matter of whim or personal disinclination. 'A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest.' Eccles v. Peoples Bank, 333 U. S. 426, 431, 68 S. Ct. 641, 644, 92 L. Ed. 784. We have cautioned against declaratory judgments on issues of public moment, even falling short of constitutionality, in speculative situations. Eccles v. Peoples Bank, supra, at 432, 68 S. Ct. at 644."[28]

Our doubt about the propriety of giving consideration to the request for declaratory relief in the circumstances of this case is based upon our concern that by permitting a defendant to interrupt a state court prosecution to challenge the statute un-

[28] In *Abbott Laboratories v. Gradner*, 387 U. S. 136, 155, 87 S. Ct. 1507, 1519, 18 L. Ed. 2d 681 (1967), the Supreme Court said, "A court may even in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere." Generally, a court may, in its discretion, refuse to grant a declaratory judgment if the issues raised may be fully adjudicated in a suit pending in a state court at the time the federal declaratory judgment action was instituted. 1A Moore's Federal Practice ¶0.220 at p. 2603.

der which he is being prosecuted, we could open the door to constant disruption of state court criminal proceedings. Ingenious counsel for a defendant in a state criminal prosecution would not find it difficult to phrase his defense in terms of constitutionality so as to make it possible to bring a suit for declaratory relief in a federal district court during the pendency of a state court prosecution. This might well do violence to the strong federal policy of comity as expressed by the Supreme Court in *Stefanelli v. Minard*, 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138 (1951) and *Cleary v. Bolger*, 371 U. S. 392, 83 S. Ct. 385, 9 L. Ed. 2d 390 (1963).[29]

[29] A somewhat comparable situation is found in the efforts of convicted state prisoners to seek declaratory relief in the federal courts. The rule is well established in several circuits that a defendant convicted of a crime should not be permitted to utilize the declaratory judgment procedure as a weapon with which to dispense with the requirement that he exhaust his state remedies before coming into federal court or as a substitute for appeal or habeas corpus. A good statement of this general rule was given by the Eighth Circuit Court of Appeals in *Waldon v. State of Iowa*, 323 F. 2d 852, 853 (8th Cir., 1963):

"A state prisoner is not entitled to seek a declaratory determination from the federal courts under 28 U.S.C.A. § 2201 as to the validity of the judgment on which he is confined. If the restraint in which he is held is constitutionally invalid, the federal courts have the power to release him therefrom in habeas corpus, after exhaustion by him of such state remedies as are available to him. He cannot resort to a federal declaratory judgment suit in an effort to escape having to exhaust available state remedies and to circumvent the intent manifested by Congress in 28 U.S.C.A. § 2254 that the state courts are to be given 'the opportunity to pass upon and correct errors of federal law in the state prisoner's conviction', Fay v. Noia, 372 U. S. 391, 438, 83 S. Ct. 822, 848, 9 L. Ed. 2d 837."

In *Forsythe v. Ohio*, 333 F. 2d 678, 679 (6th Cir., 1964), the Sixth Circuit Court of Appeals stated, "We are satisfied that the Declaratory Judgment Act, 28 U.S.C.A. § 2201, cannot be used as a substitute for appeal, habeas corpus, coram nobis or other procedures enjoying currency among the many now

Another reason which causes us to doubt whether declaratory relief should be entertained here is the fact that there are certain differences between the circumstances in *Zwickler* and those in the case before us. In *Zwickler* there was no pending prosecution and no evidence of a real threat of future prosecution. Furthermore, *Zwickler* was concerned with a substantial attack on a statute which on its face allegedly violated First Amendment rights because of its restraints upon anonymous handbills.[30] In this regard the Supreme Court said in *Zwickler:*

> "These principles have particular significance when, as in this case, the attack upon the statute on its face is for repugnancy to the First Amendment. In such case to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very con-

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seeking release from prison." Other recent cases holding that the federal district court may refuse to grant declaratory relief to review convictions before state remedies have been exhausted are *Benson v. State Board of Parole & Probation,* 384 F. 2d 238 (9th Cir., 1967); *Booker v. State of Arkansas,* 380 F. 2d 240 (8th Cir., 1967); *Scruggs v. Henderson,* 380 F. 2d 981 (6th Cir., 1967); *United States ex rel Bennett v. People of the State of Illinois,* 356 F. 2d 879 (7th Cir., 1966), cert. den. 384 U. S. 946, 86 S. Ct. 1472, 16 L. Ed. 2d 544 (1966); and *Shannon v. Sequeechi,* 365 F. 2d 827 (10th Cir., 1966), cert. den. 386 U. S. 481, 87 S. Ct. 1175, 18 L. Ed. 2d 225 (1967), reh. den., 386 U. S. 1014, 87 S. Ct. 1354, 18 L. Ed. 2d 452 (1967).

[30] In *Malone v. Emmet,* 278 F. Supp. 193, 200 (M. D. Ala., 1967), the court said, "[A]s the Court in *Zwickler* was careful to observe, the asserted constitutional act was the First Amendment guarantee of free speech. The Supreme Court in *Zwickler* . . . places free speech and other First Amendment rights in a special category."

stitutional right he seeks to protect." 88 S. Ct. at 397-398.

However, we do not believe that the conspiracy statute can be the object of a valid or substantial attack on First Amendment grounds.

Nevertheless, despite our serious misgivings about considering the request for declaratory relief, we have concluded to rule on the constitutionality of the conspiracy statute. LSA-R.S. 14:26, the Louisiana conspiracy statute, provides.

"Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime: provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination.

"Where the intended basic crime has been consummated the conspirators may be tried for either the conspiracy or the completed offense, and a conviction for one shall not bar a prosecution for the other.

"Whoever is a party to a criminal conspiracy to commit a crime punishable by death or life imprisonment, shall be imprisoned at hard labor for not less than one nor more than twenty years.

"Whoever is a party to a criminal conspiracy to commit the crimes of theft or of receiving stolen things shall be fined not more than two hundred dollars, or imprisoned for not more than one year, or both.

"Whoever is a party to a criminal conspiracy to commit any other crime shall be fined or imprisoned, or both, in the same manner as for the offense contemplated by the conspirators; but such fine or imprisonment shall not exceed one-half of the largest fine, or one-half the longest term of imprisonment prescribed for such offense, or both."

This statute is not unique. In fact, it is merely a restatement of the common-law crime of conspiracy. It is similar to the federal conspiracy statute, 18 U.S.C. § 371, which provides in part:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Basically, there is very little to distinguish between these two statutes. Both require a conspiracy between two or more people to commit a crime and both further provide that one of the parties to the conspiracy must do an act to effect, or in furtherance of, the object of the conspiracy.

As the Supreme Court pointed out in *Scales v. United States*, 367 U. S. 203, 225, 81 S. Ct. 1469, 1484 (1961), the concept of conspiracy "manifest[s] the more general principle that society, having the power to punish dangerous behavior, cannot be powerless against those who work to bring about that behavior." See also *Johnson v. Lee*, 281 F. Supp. 650, 655 (D. Conn., 1968).

One of the plaintiff's contentions is that the word "crime" in the Louisiana conspiracy statute (a part of the Louisiana Criminal Code) is not defined. But LSA-R.S. 14:7, also a part of the Louisiana Criminal Code, states "a crime is that conduct which is defined as criminal in the Code or in other acts of the Legislature or in the Constitution of this state." The Reporter's Comment to 14:7 states that the Louisiana criminal law is purely statutory and that there are no other crimes than those defined in the Code or other statutes of this State.[31] We see no constitutional infirmity in defining "crime" in this manner. In fact, a definition of this sort is much more precise

[31] It is well settled under the Louisiana jurisprudence that "[w]e have in this state no common-law crimes. Nothing is a crime which is not made so by express statute," *State v. Robinson*, 143 La. 543, 78 So. 933, 937 (1918). "[I]t is well-settled that no act or conduct, however reprehensible, is a crime in Louisiana unless it is defined and made a crime clearly and unmistakably by statute." *State v. Sanford*, 203 La. 961, 14 So. 2d 778, 781 (1943). In *State v. Arkansas Louisiana Gas Company*, 227 La. 179, 78 So. 2d 825, 827 (1955), the Supreme Court of Louisiana said, "It is so axiomatic, that citation of authority is unnecessary, that in Louisiana there are no common-law crimes, and that nothing is a crime, no conduct can be held criminal, which is not made so by statute and clearly described by the language of its prohibition."

than a general definition, since there can be no crime which is not found in Louisiana's statutory law.

The plaintiff also contends that 14:26 is violative of the First Amendment to the United States Constitution because it punishes a person for merely expressing his thoughts about committing a crime. However, the statute does not punish a person for saying he would like to commit a crime, but only for entering into an "agreement or combination" with one or more other persons to commit a crime. Such an agreement is much more than the mere expression of one's thoughts; it is conduct which leads directly to criminal consequences and against which society has the right to protect itself. We are of the opinion, therefore, that plaintiff has demonstrated no constitutional invalidity to the Louisiana conspiracy statute.

We believe that it is obviously improper to rule on the constitutionality of the numerous procedural statutes challenged by the plaintiff. The plaintiff is not being prosecuted under these statutes so *Zwickler* is inapplicable. Furthermore, what we have already said about the federal policy against the needless disruption of orderly state court criminal proceedings applies even more forcefully. The constitutionality of these statutes may properly be ruled upon by the state court, and it should again be noted that of the twelve provisions which the plaintiff is challenging on constitutional grounds in this proceeding, he has questioned the validity of only three of these laws in the state court proceeding.

Nor should we grant a declaratory judgment decreeing that the Warren Report is binding upon all courts of the United States, including the Louisiana State Court in which the prosecution is pending. The same applies to the request that we order the defendant to furnish certain documents to plaintiff. No authority has been cited nor have we found any that would authorize this relief as to these requests.[32]

Our adverse ruling to plaintiff should not be construed as an intimation of any view whatsoever on the merits of the pending criminal charge against him. As a matter of law, plaintiff Shaw's request for relief in the federal court is premature, for under our system of federalism in the circumstances presented here, he must first seek vindication of his rights in the state courts as to this pending prosecution.

The motion to dismiss, which we have considered as a motion for summary judgment, is granted and the plaintiff's suit is dismissed.

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[32] The plaintiff has also moved to compel some of the defendants to answer certain questions asked them in the course of depositions, and the defendants have moved to have all of the defendants except Jim Garrison dropped from these proceedings. However, it is not necessary to rule on these motions since they have become moot by virtue of our rulings on the other issues in this case.

Date: July 23, 1968.

ROBERT A. AINSWORTH, Jr.,
UNITED STATES CIRCUIT
JUDGE
FREDERICK J. R. HEEBE
UNITED STATES DISTRICT
JUDGE
JAMES A. COMISKEY
UNITED STATES DISTRICT
JUDGE

HEEBE, District Judge, concurs, and will hand down a concurring opinion.

APPENDIX C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION No. 68-1063, SECTION "B"

CLAY L. SHAW,

Plaintiff,

versus

JIM GARRISON, individually, and as District Attorney for the Parish of Orleans, State of Louisiana; and JAMES L. ALCOCK, individually, and as Executive Assistant District Attorney for the Parish of Orleans, State of Louisiana, and CHARLES R. WARD, individually, and as an Assistant District Attorney for the Parish of Orleans, State of Louisiana,

Defendants.

Before AINSWORTH, Circuit Judge, and HEEBE and COMISKEY, District Judges.

PER CURIAM:

In the unanimous decision of this Court on July 23, 1968, we decided that plaintiff Shaw was not entitled to an injunction against defendant District Attorney Garrison, barring Shaw's prosecution in the Louisiana State Court for the commission of an alleged crime against the State of Louisiana. Accordingly, we ordered Shaw's suit dismissed. We remain of that view, and nothing has happened to change our opinion, which we herewith reaffirm, that the suit should have been dismissed.

However, plaintiff Shaw has now filed his notice of appeal to the United States Supreme Court, in accordance with applicable law, and has also filed his motion with this Court for an injunction pending appeal, restraining further prosecution in the Louisiana State Court until his appeal can be disposed of by the United States Supreme Court. In the meanwhile, we are informed that the pending State prosecution against Shaw has been set for trial at the instance of defendant Garrison, on September 10, 1968.

It is obvious that Shaw's appeal to the United States Supreme Court cannot be considered and disposed of prior to September 10, 1968, and that unless the prosecution is stayed, Shaw's appeal will become moot without having a chance for its consideration by the United States Supreme Court. In effect, Shaw will thus be deprived of an appeal from our decision.

We have fully considered the written response of defendant Garrison, in opposition to plaintiff's motion. Nevertheless, we are of the view that Shaw is entitled to have his appeal determined by the United States Supreme Court, under the circumstances presented by this case, and that our failure to grant him an injunction against the State prosecution pending appeal would deprive him of his right of appeal since it would thereby become moot.

We have, therefore, entered the attached order enjoining the prosecution pending Shaw's appeal to the United States Supreme Court.

ROBERT A. AINSWORTH, JR.
UNITED STATES CIRCUIT
JUDGE

FREDERICK J. R. HEEBE
UNITED STATES DISTRICT
JUDGE

JAMES A. COMISKEY
UNITED STATES DISTRICT
JUDGE

Date: Aug. 13, 1968.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION No. 68-1063, SECTION "B"

CLAY L. SHAW,

Plaintiff,

versus

JIM GARRISON, individually, and as District Attorney for the Parish of Orleans, State of Louisiana, and JAMES L. ALCOCK, individually, and as Executive Assistant District Attorney for the Parish of Orleans, State of Louisiana, and CHARLES R. WARD, individually, and as an Assistant District Attorney for the Parish of Orleans, State of Louisiana,

Defendants.

ORDER GRANTING INJUNCTION PENDING APPEAL.

This cause came on to be further heard on motion of plaintiff for an injunction pending appeal, and it appearing to the Court that the relief herein granted is necessary to preserve plaintiff's rights, pending appeal by the plaintiff to the Supreme Court of the United States, for the reasons appearing in the findings of fact and conclusions of law filed herewith,

IT IS ORDERED that, until such time as the plaintiff's appeal has been disposed of by the United States Supreme Court, the defendants be and they are hereby restrained and enjoined from further prosecution of the case entitled "State of Louisiana vs. Clay L.

Shaw", No. 198-059 of the Docket of the Criminal District Court for the Parish of Orleans, State of Louisiana.

New Orleans, Louisiana, this 13 day of August, 1968.

ROBERT A. AINSWORTH, JR.
FREDERICK J. R. HEEBE
JAMES A. COMISKEY
JUDGES

MOTION
DISMISS
AFFIRM

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 579

CLAY L. SHAW,

Appellant

versus

JIM GARRISON et al.,

Appellees

MOTION TO DISMISS OR AFFIRM

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Appellees respectfully move that the within appeal be dismissed for want of a substantial Federal question, or that the judgment of the District Court be affirmed on the ground that it is manifest that the questions presented are so unsubstantial as not to need further argument.

Statement

Because of the diffuse nature of the statement of facts in appellant's jurisdictional statement, appellees take the liberty of restating the essential facts herein, briefly and simply.

On March 1, 1967, appellant was arrested on a charge of conspiring to murder President John F. Kennedy, in violation of the Louisiana criminal-conspiracy statute. *Complaint, Article 5.* Although his prosecution on this non-capital charge could have been instituted by a simple information filed by the District Attorney, he proceeded on a more formal, deliberate course in view of the underlying and surrounding circumstances of the case.

The District Attorney first took the unusual step of requesting a preliminary examination. *Complaint, Articles 6, 13.* While such a request may be made either by the State or by the defendant under Article 292 of the Louisiana Code of Criminal Procedure, such requests are ordinarily made by defendants.

At the conclusion of a three-day hearing, in which eyewitness evidence of appellant's participation in the asserted conspiracy was presented, a panel of three judges of the Criminal District Court held unanimously that probable cause had been established to justify criminal process against appellant. *Complaint, Articles 13, 17.* The transcript of the hearing is in the record.

Despite this judicial confirmation of his position, the District Attorney still refrained from proceeding by mere information. Instead, he presented the matter to the Parish grand jury, which returned a true bill indicting appellant on the conspiracy charge. *Complaint, Article 18* and *Exhibit A.* The indictment was returned on March 22, 1967.

On August 1, the District Attorney moved the court to fix a trial date; and appellant then moved for a continuance or change of venue on the ground that the case had been given undue publicity. The District Attorney consented to a continuance to February 1968, almost a year after the initial arrest. *Complaint, Articles 23, 28, 30* and *Exhibits G* and *J*.

In February 1968, appellant again moved for a change of venue. After what the District Court below aptly described as an "extensive evidentiary hearing" in the course of which more than eighty witnesses testified, appellant's motion was denied on April 4. *Complaint, Articles 31, 34* and *Exhibits K* and *M*.

Appellant sought review on certiorari by the Supreme Court of Louisiana, which, on April 23, denied the application, stating: "This Court will not interfere with orderly proceedings in the trial court, in the absence of a showing of irreparable injury. Relator has a remedy by appeal in the event of conviction." *Complaint, Articles 35-37; 209 So.2d 37* (1968).

The District Attorney then set the trial for June 11, 1968. *Complaint, Article 115.* On May 27, appellant filed this suit in the United States District Court for the Eastern District of Louisiana, against the District Attorney and two of his assistants, seeking to enjoin them from proceeding with the criminal prosecution in the State court. A temporary restraining order was granted.

The prolix, 60-page, 125-article complaint and amended complaint allege that many of the provisions of Louisiana's Code of Criminal Procedure—including the provisions requiring secrecy of grand jury proceedings *(Complaint, Article 60)*, and permitting excuse of women from jury duty (*Complaint, Articles 110, 114)*—are unconstitutional, and that many occurrences in the State's prosecution of appellant—including the appointment of a member of a private segregated athletic club as foreman of the grand jury (*Complaint, Articles 107-108*), and exclusion of all 26 volumes of the Warren Commission Report from evidence in the preliminary examination (*Complaint, Article 102*)—have infringed his constitutional rights. *Complaint, Articles 5, 7, 9, 19, 24, 26, 40-63, 85-89, 106-15, Amended Complaint, Articles 117-19, 122.*

The complaint also seeks a declaration that Louisiana's criminal-conspiracy statute is unconstitutionally vague. *Complaint, Articles 64-65.*

Finally, the complaint seeks Federal-court injunctive relief against further prosecution of the criminal proceeding in the State court, on the ground that the prosecution is designed solely to invade First-Amendment rights by intimidating not only appellant, but "any and all individual citizens who disagree with (the defendants') theories as to the assassination of President Kennedy", and is "not motivated by any expectation of securing a valid conviction". *Amended Complaint, Articles 120, 122(a), 125.*

But, in the event of conviction, says the complaint, appellant would be caused irreparable injury from attendant publicity and possible incarceration without bail pending appeal. *Complaint, Article 41.*

This suit for injunction was heard before a three-judge District Court on defendants' motion to dismiss, treated by the Court as a motion for summary judgment. On July 23, the Court rendered its unanimous decision dismissing the action, and the District Attorney fixed the trial of the State-court criminal proceeding for September 10.

On appellant's application, the Court below, on August 13, entered an order enjoining the prosecution of the State-court criminal action pending disposition of this appeal, stating that "'nothing has happened to change our opinion, which we herewith reaffirm, that the suit should have been dismissed", but that "nevertheless, we are of the view that Shaw is entitled to have his appeal determined by the United States Supreme Court, under the circumstances presented by this case, and that our failure to grant him an injunction against the State prosecution pending appeal would deprive him of his right of appeal since it would thereby become moot".

Argument

The correctness of the judgment below is demonstrated unanswerably in the District Court's exhaustive opinion.

A

As to the alleged procedural infirmities in the prosecution of appellant, this Court has repeatedly held that state-court prosecutions will not be enjoined in the Federal courts on this ground [*Cleary vs Bolger,* 371 US 392 (1963); *Stefanelli vs Minard,* 342 US 117 (1951)]: "If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution." *Stefanelli vs Minard, supra,* 342 US at 123-24; quoted with approval in *Cleary vs Bolger, supra,* 371 US at 397.

28 USC §2283 declares that "a court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its

judgments". An accused whose rights are infringed by procedural irregularities in a state court has ample remedies by appeal, and through state and Federal habeas-corpus proceedings: "To permit such claims to be litigated collaterally as is sought here, would in effect frustrate the deep-seated federal policy against piecemeal review." *Cleary vs Bolger, supra*, 371 US at 401.

B

The District Court's holding that the Louisiana criminal-conspiracy statute is constitutional is unassailable. This statute is modeled on the Federal conspiracy statute (18 USC §371; see Reporter's Comment following Louisiana RS 14:26), and simply codifies the common-law crime.

C

The District Court was also unassailably correct in declining to declare invalid the many provisions of the Louisiana Code of Criminal Procedure attacked by appellant. The jurisdiction conferred by the Declaratory Judgment Act is discretionary in any event. *Public Affairs Associates vs Rickover*, 369 US 111, 112 (1962). This discretion is properly to be exercised by deferring decision to another court already seized of the issue [*Abbott Laboratories vs Gradner*, 387 US 136, 155 (1967), 1A *Moore's Federal Practice* ¶0.220]. To permit such claims to be litigated collaterally in a Federal declaratory action

would be just as disruptive and frustrating as to permit the state-court prosecution to be enjoined directly.

Appellant seeks to rely on *Zwickler vs Koota,* 389 US 241 (1967), in which this Court reversed a District Court refusal to pass on the constitutionality of a state penal statute; but that decision was rightly distinguished by the District Court in the instant case. In *Zwickler* there was no pending state-court prosecution in which the issue could be resolved, and the plaintiff sought adjudication of the validity of a substantive statute under which his prosecution was threatened, which he contended was unconstitutional on its face as an infringement of First-Amendment rights, and which was not susceptible of state-court construction obviating the constitutional issue.

In the case at bar, the innumerable procedural issues raised by appellant can be (and most have already been) raised and settled in the pending prosecution itself. This phase of the case involves, not the essential constitutionality of the substantive statute under which appellant is charged, but a wholesale attack on multiple procedural provisions, which can be determined as to each, only in the context in which it has been, or may be, raised and applied.

D

Finally, appellant seeks to bring this case within the ambit of *Dombrowski vs Pfister*, 380 US 479 (1965), in which this Court carved out an exception to the long-standing rule of Federal non-interference in pending state-court criminal prosecutions.

The rationale and limitations of *Dombrowski* are stated in this Court's later opinion in *Cameron vs Johnson*, 390 US 611, 618-20 (1968): "The prosecutions there begun and threatened were not, as here, for violation of a statute narrowly regulating conduct which is intertwined with expression, but for alleged violations of various sections of excessively broad Louisiana statutes regulating expression itself. . . . Despite state court actions quashing arrest warrants and suppressing evidence purportedly seized in enforcing them, Louisiana officials continued to threaten prosecutions of Dombrowski and his co-appellants under them. In that context, we held that a case of 'the threat of irreparable injury required by traditional doctrines of equity' was made out . . . . We held further that the sections of the [Louisiana] Subversive Activities and Communist Control Law (for alleged violations of which indictments had been obtained while the case was pending in the federal court) were patently unconstitutional on their face . . . . In short, we viewed *Dombrowski* to be a case presenting a situation of the 'impropriety of [state officials] invoking the statute in bad faith to impose continuing harassment

in order to discourage appellants' activities . . . .' . . . In contrast, the District Court expressly found in this case 'that there was no harassment, intimidation, or oppression of these complainants in their efforts to exercise their constitutional rights, but they were arrested and they are being prosecuted in good faith . . . .' Any chilling effect on the picketing as a form of protest and expression that flows from good-faith enforcement of this valid statute would not, of course, constitute that enforcement an impermissible invasion of protected freedoms. . . . Appellants' case that there are 'special circumstances' establishing irreparable injury sufficient to justify federal intervention must therefore come down to the proposition that the statute was enforced against them, not because the Mississippi officials in good faith regarded the picketing as violating the statute, but in bad faith as harassing appellants' exercise of protected expression with no intention of pressing the charges or with no expectation of obtaining convictions, knowing that appellants' conduct did not violate the statute. We agree with the District Court that the record does not establish the bad faith charged."

The case at bar is governed by *Cameron*, not by *Dombrowski*. The substantive statute here at issue does not regulate expression itself, but, at best, verbal acts and conduct intertwined therewith (a conspiracy resulting from conversation among the conspirators). The statute is patently valid, not unconstitutional, on its face. Appellant is being prosecut-

ed, not in despite of state-court rulings indicating that the prosecution is unwarranted, but in pursuance of a state-court preliminary finding of probable cause confirmed by a grand jury indictment.

Appellant's conclusionary allegations of bad faith and unfounded harassment with no intention of prosecution or expectation of conviction, founder on the undisputed facts that the District Attorney refrained from prosecuting by information in favor of submitting his evidence first to the court on preliminary examination and then to the grand jury, both of which confirmed the existence of probable cause, and that the District Attorney has since made repeated efforts to afford appellant his constitutional right to a speedy trial—as well as by appellant's own further insistence that he is being put in jeopardy of conviction.

Appellant's contention that he has been singled out as the cynosure of the appellees' efforts to suppress comment favorable to the Warren Commission Report, is patently artificial in light of his counsel's admission to the District Court that appellant has never taken a public position as to the validity of the Report's conclusions.*

* "During the oral hearing on this motion, counsel for plaintiff informed the Court that the plaintiff has never publicly taken a stand either for or against the Warren Report, nor has he made any public statements about his theories on the assassination of President Kennedy. It is clear that the prosecution was not instituted for the purpose of discouraging the plaintiff in the exercise of his First Amendment rights." *Opinion of the District Court, page 14.*

In this case, as in *Cameron vs Johnson*, it is unnecessary to reach the question whether injunction actions brought under the Civil Rights Act (42 USC §1983) form an exception to the prohibition of 28 USC §2283, since it is clear that no valid ground for restraint of the State-court prosecution has been asserted by appellant in any event.*

Conclusion

The burden of appellant's complaint is simply that he is being subjected to the naturally galling inconveniences that are the lot of every person so unfortunate as to be the subject of a criminal prosecution. These are part of the "injury incidental to every proceeding brought lawfully and in good faith" (*Cameron vs Johnson*, 390 US at 618); and do not justify the intervention of a Federal court in contravention of 28 USC §2283.

On the contrary, this Court has consistently held that even unconstitutionality of a statute under which a prosecution has been instituted does not warrant a Federal injunction, for "no person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as

* This question did not arise in *Dombrowski* because the injunction action in that case was brought before the threatened State-court prosecution had been commenced.

readily in the criminal case as in a suit for an injunction." *Douglas vs City of Jeannette*, 319 US 157, 163 (1943), refusing to enjoin a prosecution for violation of an ordinance held unconstitutional the same day in *Murdock vs Pennsylvania*, 319 US 105 (1943).

The Federal questions presented by appellant's complaint are so clearly unsubstantial as to negate the jurisdiction of the three-judge Court below ["it is essential to (such) jurisdiction that a substantial federal question should be presented", *Ex parte Poresky*, 290 US 30, 31 (1933)], and hence that of this Court over this appeal. *Oklahoma Gas Co. vs Oklahoma Packing Co.*, 292 US 386, 392 (1934); *Thompson vs Whittier*, 365 US 465 (1961).

It is respectfully submitted that the appeal should be dismissed or that the judgment of the District Court should be affirmed.

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October, 1968

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

SHAW *v.* GARRISON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 579. Decided December 9, 1968.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.